88-949

No. _____

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD O. POST, JR.,

*Petitioner*,

—against—

JOHN M. REGAN, JR. and
MARSH & MCLENNAN COMPANIES, INC.,

*Respondents*.

## PETITION OF RICHARD O. POST, JR. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

1. May summary judgment be granted dismissing a libel suit for failure to prove the requisite degree of fault when critical *ex parte* documentary evidence of the circumstances of the libels available only to defendants and claimed by them to negate fault is viewed *in camera* and relied upon by the court without deciding plaintiff's timely motion for discovery thereof?

2. Is a private plaintiff suing a non-media business corporation for actual damages resulting from libelous accusations of professional misconduct republished in the media, required by the First Amendment to satisfy the "actual malice" standard by showing that defendants acted in a grossly irresponsible manner?

3. May summary judgment be granted dismissing a libel suit for failure to prove "actual malice" where there is abundant evidence from which a jury might return a verdict that defendants knew of the falsity of the libels when publishing them?

## PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States Court of Appeals for the Second Circuit (No. 88-7260) were Richard O. Post, Jr. and John M. Regan, Jr. and Marsh & McLennan Companies, Inc. John M. Regan, Jr. was at all relevant times the chairman of the Board of Directors and chief executive officer of co-defendant Marsh & McLennan Companies, Inc. Marsh & McLennan Companies, Inc. was and still is a corporation organized and existing under and by virtue of the laws of the State of Delaware.

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*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Richard O. Post, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit Court of Appeals.

## OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unreported and appears in the appendix to this petition starting at page 17a.

The district court's Memorandum of Decision and Order granting summary judgment for respondents is reported at 677 F. Supp. 203 and appears in the appendix to this petition start-

ing at page 3a. The district court's judgment appears at page 14a. The district court's certificate in accordance with Rule 54(b) appears at page 15a.

The district court's memorandum order regarding discovery and *in camera* inspection appears at 1a.

## JURISDICTION

The Summary Order of the Court of Appeals was filed on June 27, 1988. On September 6, 1988, the Court of Appeals denied a petition for rehearing and suggestion for rehearing *en banc* filed by petitioner. The denial by the Court of Appeals of the petition for rehearing and suggestion for rehearing *en banc* appears at page 23a. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions here involved are Rules 26(b)(3) and 56 of the Federal Rules of Civil Procedure and U.S.C.A. Const. Amend. I, V and XIV § 1, pages 24a-27a.

## STATEMENT OF THE CASE

In this diversity action filed on December 20, 1984, petitioner Richard O. Post, Jr. sues his former employer Marsh & McLennan Companies, Inc. ("MMC") and its then chairman of the board of directors, John M. Regan, Jr., ("Regan"), respondents, for libel, seeking actual, presumed and punitive damages. The libels alleged were statements concerning petitioner made by Regan on behalf of MMC at a June 8, 1984, stockholders' meeting convened to consider huge bond trading losses incurred by MMC and in conversations with news reporters immediately after that meeting.

Regan stated petitioner's employment had been terminated as a result of his involvement in the unauthorized trading activities

and that petitioner was among those who engaged in the trading and the deliberate misrepresentation and concealment thereof by falsifying company records. Petitioner had discovered and disclosed the trading activities to MMC senior management on April 5, 1984. Widespread dissemination of the libels in the media resulted in the destruction of petitioner's professional career.

Libel *per se*, simple fault, gross fault and actual malice were pleaded.

Before answer and before any document discovery, Regan's deposition in his individual capacity was taken on February 11, 1985. On that deposition Regan admitted his awareness when he spoke on June 8, 1984, that petitioner's employment had been terminated before April, 1984, for other reasons, and that he knew of no evidence tending to suggest that petitioner knew of or participated in the improper activities or their concealment.

Petitioner's June 26, 1985, Rule 34 discovery notice requested production and disclosure of any investigation reports placed before Regan regarding the bond trading affair prior to June 8, 1984. A June 6, 1984, "draft memorandum" of counsel "to files" was identified by respondents as read by Regan before he made his June 8, 1984, remarks, but its production was refused by reason of alleged attorney-client and work product privileges.

Respondents answered and MMC interposed counter-claims in June, 1985, alleging, *inter alia* that petitioner had engaged in a scheme and artifice to conceal and supress material information regarding the bond trading activities for personal gain and had violated a New York Statute prohibiting fraud, deception, and conceaiment as to the sale of securities.

Discovery proceeded and various motions pertaining thereto were decided by the district court including one by respondents for a protective order against a further deposition of Regan in his capacity as a managing agent of MMC, after answer, counter-claims and document discovery had gone forward. The

court granted respondents' motion for the stated reason that petitioner would have an opportunity to question Regan at the trial, then regarded as an event sure to take place. Post's request for judicial intervention regarding production of the June 6, 1984, investigation report was deferred to trial, which was scheduled to commence on November 4, 1987.

On June 15, 1987, the case was reassigned to a successor district judge and on August 28, 1987, respondents moved for summary judgment dismissing petitioner's complaint in its entirety. Petitioner opposed the motion for summary judgment with his own and other affidavits, many pages of depositions of reporters with whom Regan spoke on or shortly after June 8, 1984, present and former officers of MMC, the individuals most closely involved in the bond trading, public relations advisers to MMC and others, and voluminous evidence of his non-culpability in the whole affair.

In their Memorandum in Support of Summary Judgment respondents asserted that in making the allegedly libelous remarks Regan had relied in good faith upon reports of inside and outside counsel and other retained experts of their investigation of the matter. Because petitioner would have no opportunity to further interrogate Regan if the district court granted summary judgment, petitioner timely moved to compel production and discovery of such reports of counsel and for a further deposition of Regan for use in opposition to the motion, claiming that any privilege with respect to documents relied upon by Regan and contributing to his state of mind in uttering the libels had been waived under well-established principles.

Respondents opposed that motion and on October 20, 1987, the district court directed that the June 6, 1984, investigation memorandum from respondents' attorneys be submitted to the court for *in camera* inspection and at the same time and without having seen that report, denied petitioner's request for a deposition of Regan in his corporate capacity and also denied petitioner's request for documents other than the June 6, 1984, report that Regan had seen pertaining to the investigation of the bond trading losses (1a).

On January 20, 1988, without ruling on petitioner's motion for discovery of the investigation report, and without oral argument, a Memorandum Decision and Order was entered by the district court granting summary judgment dismissing the amended complaint *in toto* (3a). In its decision the court relied upon the *in camera* report describing it thus:

> Defendants have come forward with admissible evidence that the investigation and subsequent reporting were conducted in a careful, responsible manner. The investigation was conducted over a two-month period, and was not done hastily. It involved interviews of relevent parties and reviews of transactions and documents by inside and outside counsel by staff and independent accountants, as well as by senior management (12a).

Aside from what may be contained in the June 6, 1984, investigation memorandum, there is no evidence in the record of this case from which any conclusion regarding the degree of care or responsibility exercised by respondents in making the investigation or the extent to which Regan's remarks conformed to the results of same, could be derived.

Petitioner's libel claims were dismissed upon the ground that his proof had not met a requirement developed by the New York State Court of Appeals shortly after this Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 789 (1974). The New York Rule exonerated journalists covering a news story of public concern from libel responsibility unless they acted with "gross irresponsibility." The district court considered this requirement applicable to respondents because their remarks were republished in the media (11a).

The district court also relied upon a factual finding that petitioner was "charged with the responsibility of enforcing MMC's investment resolutions and complying with state laws" (12a), arrived at without mention of the enormous mass of evidence demonstrating that petitioner had been shunted aside by the two principal malefactors in the bond loss debacle, and was not so responsible. Concluding that petitioner had not shown

"gross irresponsibility" on the part of Regan or MMC "by a preponderance of the evidence" (13a) the district court dismissed the claims without trial.

## THE DECISION BELOW

On appeal, the Second Circuit affirmed in an unpublished Summary Order filed on June 27, 1988 (17a).

Overlooking the undeniable fact that all of petitioner's libel counts sought actual damages, i.e. lost earnings and recovery for mental suffering, and that such damages were established by deposition testimony before the district court, the Second Circuit stated:

> Because a state may not allow recovery of presumed and punitive damages 'absent a showing of actual malice' in a defamation action where the challenged expression related to a matter of public concern [citing *Dun & Bradstreet* v. *Greenmoss Builders, Inc.*] the District Court properly dismissed Post's defamation counts alleging libel per se and simple negligence (20a).

This Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 789 (1974) holding simple fault is a sufficient constitutional basis upon which the states may constitutionally allow compensation to private individuals for actual injury caused by libels in respect of matters of public concern, was cited and argued to the Second Circuit.

Acting further on the premise that proof of actual malice was constitutionally required for petitioner to have any right to recover, the Second Circuit stated:

> Under New York law implementing the constitutional restraints reflected in the "actual malice" standard, a plaintiff may recover only if the defendants acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties. *Chapa-*

> *deau* v. *Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61, 64 (1975) (20a),

notwithstanding that the gross irresponsibility requirement as a matter of constitutional law is inapplicable to petitioner's claims for actual damages based on simple fault.

Turning its attention to the proof, the Court of Appeals found as facts, that:

> a careful and responsible investigation into the unauthorized trading affair was conducted by MMC with the aid of outside counsel and an independent accounting firm. MMC concluded that the unauthorized transactions resulted from the unethical (and perhaps criminal) conduct of a small number of its employees, coupled with inadequate supervision by those charged with that responsibility. Post fell into this latter group (21a).

This was followed with the remarkable conclusion that respondents "were not required to specify as to each discharged employee the precise degree of culpability involved" (22a), meaning that it was perfectly all right, in the Court's view, for respondents to lump petitioner whom they thought might have been an inadequate supervisor (a hotly disputed factual issue) together with the deliberate, unethical and possibly criminal wrongdoers in describing the affair to the press corps.

In so doing the Second Circuit rejected or ignored the following contentions of petitioner:

1. Petitioner and his counsel have been denied access to the investigation report of June 6, 1984. There is no other evidence from which the above remarks as to the nature, content and conclusions of MMC's investigation as to petitioner can be drawn;

2. That investigation and respondents' reliance thereon in making the libelous remarks was interposed by respondents as a basis for the granting of summary judgment;

3. The investigative report was viewed *in camera* by the district court and, there being no other evidence in the record,

must have been accepted by the district court as proof that the investigation was "careful" and "responsible";

4. Petitioner's timely motion for discovery of such investigation report—based upon the settled rule of law that where one party interposes as a defense its reliance upon the advice or work product of counsel, that advice or work product is fully discoverable and admissible and any privilege or work product defense in respect thereof is deemed to have been waived—has never been decided; and

5. Petitioner has been denied any reasonable opportunity to make use of the investigation report to add to his own proof on the issue of fault.

In summarily dealing with this investigation report, the Court of Appeals proceeded on the assumptions that (a) petitioner contended it to be privileged and (b) it was not relied upon by the district court because some other "admissible" evidence must have been relied upon (22a) and disposed of petitioner's argument regarding failure to rule on discovery of the report for use in opposing summary judgment as follows:

> Appellant's contention concerning discovery is without merit, as is his claim that the District Court relied on privileged material in dismissing the action, see 667 F.Supp. at 209 ('Defendants have come forward with *admissible* evidence that the investigation and subsequent reporting were conducted in a careful, responsible manner') (emphasis added) (22a).

Petitioner contended any privilege had been waived by respondents when they asserted their reliance upon the investigation in defense, and, as aforesaid, there was no evidence, admissible or otherwise, regarding the nature and content of the investigation, other than the secret, *ex parte*, *in camera* report.

On September 6, 1988, the Second Circuit denied a Petition for Rehearing (23a) and Suggestion for Rehearing *En Banc* (23a).

## REASONS FOR GRANTING THE PETITION

This case merits the Court's review because the decision of the Second Circuit (1) in affirming the granting of summary judgment based upon *ex parte* evidence viewed *in camera* conflicts with the law of the First Circuit rejecting the granting of summary judgment based on such evidence as improper; (2) in granting summary judgment without permitting discovery of critical documentary evidence disregards decisions of this Court and Rule 56(f) of the Federal Rules of Civil Procedure; and (3) in denying petitioner his right to trial by jury of genuine issues of material fact on the basis of such evidence has deprived petitioner of his property without due process of law and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Review by this Court is further warranted because the Second Circuit disregarded the decision of this Court in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 31 L.Ed. 2d 789 (1974) in upholding summary judgment dismissing petitioner's libel claims for actual injury by erroneously imposing upon petitioner a constitutional duty to prove "actual malice".

Review is also made appropriate by the failure of the Second Circuit to follow this Court's directives that on summary judgment the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor, when it upheld summary judgment for failure to show actual malice in the face of abundant evidence upon which a jury could return a verdict that respondents had actual knowledge of the falsity of their accusations as to petitioner.

## ARGUMENT

### I. THE SECOND CIRCUIT HAS SANCTIONED THE GRANTING OF SUMMARY JUDGMENT AND MADE ITS OWN FINDINGS OF FACT IN SUPPORT OF SAME BASED UPON *EX PARTE* EVIDENCE VIEWED *IN CAMERA*, AND HAS DEPRIVED PETITIONER OF DISCOVERY OF IMPORTANT EVIDENCE AVAILABLE ONLY TO THE MOVANT NEEDED IN ORDER TO OPPOSE SUMMARY JUDGMENT. THIS CONFLICTS WITH DECISIONS OF THIS COURT AND THE FIRST CIRCUIT AND REQUIRES EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Summary judgment should not be granted in a case where the evidence is in the possession of the movant and the non-movant has not had a full opportunity to conduct discovery. *Anderson* v. *Liberty Lobby Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 217 (1986); Rule 56(f) Fed.R.Civ.Pro. It is even more inappropriate to grant summary judgment in a case where the evidence is in the possession of the movant and the opposing party has not had discovery thereof, and the court utilizes such *ex parte* evidence as the basis for granting summary judgment. *Bane* v. *Spencer*, 393 F.2d 108 (1st Cir. 1968), *cert denied*, 91 S.Ct. 108, 27 L.Ed.2d 105 (1970); *Association for Reduction of Violence* v. *Hall*, 734 F.2d 63 (1st Cir. 1984).

Here, the corporate and individual respondents claimed that petitioner could not show actual malice or gross irresponsibility on their part because Regan who uttered the libels, had relied in good faith upon a careful and responsible investigation conducted by inside and outside counsel and others.

The only written report of that investigation identified by respondents as seen by Regan in response to petitioner's Rule 34 request for discovery of June 26, 1985, was the memorandum of June 6, 1984, production of which was withheld by reason of claimed attorney-client and work product privileges.

Petitioner made his objection to the withholding of this memorandum known to the district court on June 12, 1986, and was advised to wait until the trial by District Judge Griesa.

Later, after reassignment to District Judge Daronco, the motion for summary judgment was made. Petitioner filed a written motion to compel discovery of the investigation memorandum which resulted in the memorandum decision of October 20, 1987 (1a) requiring production of that memorandum for *in camera* inspection. The district court received and reviewed this memorandum and its exhibits, but never decided petitioner's motion for its production.

It is fundamental that when a party injects into litigation its good faith and state of mind and relies upon a report of counsel of an investigation as justifying its conduct, that such a report must be made available, privilege or no privilege. *Hunt* v. *Blackburn*, 9 S.Ct. 125, 32 L.Ed. 488 (1888); *Transworld Airlines Inc.* v. *Hughes*, 332 F.2d 602 (2d Cir. 1964); *Kunglig Jarnvagsstyrelsen* v. *Dexter & Carpenter, Inc.*, 32 F.2d 195, 201 (2d Cir. 1929), *cert. denied*, 50 S.Ct. 32, 74 L.Ed. 629 (1929).

Regan's state of mind on June 8, 1984, is of central importance on the question of fault. This too, entitles petitioner to view the investigation memorandum. The situation is analogous to reliance of members of the press upon the confidential editorial process in media libel cases. In *Herbert* v. *Lando*, 441 U.S. 153, 60 L.Ed. 2d 115 (1979) this Court made it abundantly clear that in a libel suit there is no privilege under the First Amendment guarantee of freedom of the press that can bar the plaintiff from inquiring into the editorial process of those responsible for the publication where the inquiry will produce evidence material to the proof of a critical element of the plaintiff's cause of action, such as the degree of fault involved.

Here, not only has petitioner been denied an opportunity to inquire into the investigation report admittedly shown to respondent Regan shortly before the making of the defamatory remarks, but it is obvious that the district court, and the Second Circuit relied upon the *in camera* investigation report in making their respective findings as to the conduct of the investigation.

There is no evidence in the record other than whatever is contained in the *in camera* memorandum that could come remotely close to enabling the Court of Appeals to find:

> A careful and responsible investigation into the unauthorized trading affair was conducted by MMC with the aid of outside counsel and an independent accounting firm (21a).

Petitioner is requesting the Clerk of the Second Circuit to certify the entire record and transmit it to this Court to enable verification of the foregoing.

Who was interviewed? What did they say? What did the investigators conclude as to Post? Did Regan depart from those conclusions in his remarks? If so, in what respects? Were those conclusions negligently reached? Petitioner, we submit, is affirmatively entitled to this information.

Because the report of the investigation has been withheld from petitioner, petitioner and his counsel are reduced to guessing as to its contents. If it is true that the investigation report concluded that petitioner had inadequately supervised, petitioner is entitled to review the basis for that conclusion and to have a jury determine whether such was truly the case, and, in any event, it is for the jury to determine whether and to what extent respondents were at fault in not distinguishing between petitioner and the deliberate wrongdoers in their remarks.

Petitioner's libel claims constitute an interest in property within the meaning of the Fifth and Fourteenth Amendments. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 71 L.Ed.2d 265 (1982); *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 94 L.Ed. 865 (1950). Petitioner has been deprived of that interest without procedural due process.

Review by this Court is, accordingly, indicated.

## II. REVIEW SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT APPLIED THE WRONG CONSTITUTIONAL STANDARD IN UPHOLDING DISMISSAL OF PETITIONER'S LIBEL CLAIMS SEEKING DAMAGES FOR ACTUAL INJURY.

The libels sued upon concern fraud, concealment, professional incompetence and resulting termination of employment having to do with claimed improprieties in the investment of a business corporation's cash. The Second Circuit held these libels to have "undoubtedly addressed a matter of 'public concern' sufficient to trigger heightened constitutional protections" (20a).

Then the Second Circuit correctly stated the proposition of constitutional law that a state may not allow recovery of presumed and punitive damages absent a showing of actual malice in such a situation (20a).

However, the Second Circuit went on to uphold dismissal of petitioner's defamation counts alleging libel *per se* and simple negligence on that basis, oblivious to the fact, overwhelmingly apparent from petitioner's motion papers, that each of his defamation counts sought compensation for actual harm consisting *inter alia* of lost earnings and mental suffering.

Even accepting, *arguendo*, the questionable proposition that the subject matter of these libels constituted protected expression on a matter of public concern (see *Ohralik* v. *Ohio State Bar Assoc.*, 436 U.S. 447, 456 56 L.Ed. 2d 444, 453 (1978) listing decisions of this Court holding the exchange of information about securities, corporate proxy statements, price and production information among competitors and similar commercial expressions as subject to regulation without offending the First Amendment), petitioner as a private individual is not required by the First Amendment to establish anything more than simple fault in order to recover damages for actual injury.

That is the holding of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed. 789 (1974). ("It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless

disregard for the truth to compensation for actual injury", 418 U.S. at 350).

The Second Circuit considered the rule of the New York Court of Appeals in *Chapadeau* v. *Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199 (1975), (media defendants must have acted in a grossly irresponsible manner without due consideration for ordinary standards of responsible information gathering and dissemination, before they can be responsible for libel on a matter of public concern) to be an implementation of the constitutional actual malice requirement (20a). The Second Circuit reasoned that this Court's decision in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders*, 472 U.S. 749 86 L.Ed.2d 593 (1985) abolished any constitutional distinction between media and non-media libels insofar as private plaintiff libel claims are concerned and rejected petitioner's contention that only media defendants could require proof of gross irresponsibility as a condition of their liability (21a).

But again, the Second Circuit lost sight of the fundamental proposition that a private libel plaintiff may be permitted by the states to recover damages for actual injury upon a showing of simple fault where the subject matter of the libels is of public concern without offending the First Amendment. Proof of actual malice or gross irresponsibility or satisfaction of any other implementation of the actual malice requirement is not required.

The determination of the Second Circuit that petitioner's actual damage claims must be dismissed because his proof "cannot as a matter of law satisfy the gross irresponsibility standard" (21a), is the product of the application of an incorrect constitutional standard and should be reviewed and corrected by this Court.

## III. REVIEW SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT DISREGARDED THIS COURT'S DIRECTIVES THAT ON MOTIONS FOR SUMMARY JUDGMENT THE NON-MOVANT'S EVIDENCE SHOULD BE BELIEVED AND ALL LEGITIMATE INFERENCES RESOLVED IN HIS FAVOR WHEN IT FAILED TO CREDIT ABUNDANT EVIDENCE FROM WHICH A JURY COULD RETURN A VERDICT THAT RESPONDENTS HAD ACTUAL KNOWLEDGE OF THE FALSITY OF THEIR LIBELS.

Regan was quoted in numerous articles in the public press as stating that petitioner had been fired as a result of the bond trading. Three newspaper reporters testified to the accuracy of these depictions of Regan's remarks and their depositions are in the record. Petitioner, by deposition and affidavit, and Regan by deposition, agreed that petitioner's employment was terminated earlier for reasons unrelated to the bond trading. It was undisputed that petitioner discovered and disclosed the improper trading activities to MMI senior management.

There was uncontradicted deposition testimony that Regan made statements to a *Wall Street Journal* reporter from which a jury could readily infer that he accused petitioner of being among those who concealed the improper trading. In his prepared remarks Regan described the falsification of MMI records to conceal the trading, the deliberate wrongdoing and the fact that the investigation had made it appropriate to terminate certain employees. Thereafter he identified petitioner as one of those discharged. He admitted on deposition that when he spoke on June 8, 1984, and at the time of his deposition, he knew of no evidence tending to suggest that petitioner had known of or participated in the trading activities or in the concealment thereof by falsifying company records or otherwise.

On this record a jury would abundantly be warranted in returning a verdict that Regan had accused petitioner of involvement in the trading and its concealment and of having been discharged as a result thereof with full knowledge of the falsity of his remarks.

Neither the district court nor the Second Circuit addressed these facts.

There was undisputed, unimpeached evidence that respondents refused to issue a reasonable, meaningful corrective statement although same was repeatedly requested. That too is evidence of malice.

The evidence is overwhelmingly sufficient to warrant a jury verdict of knowledge of falsity of their remarks on the part of respondents. This is true under well-settled New York law, *Cohalan* v. *New York Press Co.*, 212 N.Y. 344, 347 (1914); *Crane* v. *Bennett*, 177 N.Y. 106, 113 (1904), *Rabin* v. *Landon*, 38 N.Y.2d 827 (1976), and under this Court's First Amendment "actual malice" requirement. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280, 11 L.Ed. 2d 686, 706 (1964).

Petitioner has been deprived of his fundamental right to trial by jury of the issues of material fact as to the degree of respondent's fault and review should be granted to correct this egregious error.

## CONCLUSION

FOR THE REASONS STATED ABOVE, A WRIT OF CERTIORARI SHOULD BE GRANTED TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respectfully submitted,

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# APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 9185

RICHARD O. POST, JR.,

*Plaintiff*,

—against—

JOHN M. REGAN, JR. and
MARSH & MCLENNAN COMPANIES, INC.,

*Defendant*.

MEMORANDUM ORDER

DARONCO, D.J.

This case is before the Court upon a discovery dispute, assertedly engendered by defendants' motion for summary judgment. After considering the parties' submissions, the Court directs that a document identified as a June 6, 1984 memorandum from defendants' attorney be submitted to the Court for *in camera* inspection. Additionally, plaintiff has not shown the necessity or appropriateness of a second deposition of defendant John M. Regan, Jr., and the request for "all documents prepared in connection with the investigation of the corporate defendants' $165 million pre-tax loss brought to light by plaintiff on April 5, 1984 . . .," plaintiff's memorandum of law at 1-2, is overbroad, and accordingly, denied.

SO ORDERED.

DATED: New York, New York
October 20, 1987

/s/ RICHARD J. DARONCO
Richard J. Daronco
U.S.D.J.

The Clerk is directed to mail a copy of this Memorandum Order to counsel for each party.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 9185

RICHARD O. POST, JR.,

*Plaintiff,*

—against—

JOHN M. REGAN, JR. and
MARSH & MCLENNAN COMPANIES, INC.,

*Defendants.*

MEMORANDUM OF DECISION AND ORDER

DARONCO, D.J.

Plaintiff, Richard O. Post, Jr., brings this action against his former employer, Marsh & McLennan Companies, Inc. ("MMC" or the "Company"), an insurance brokerage and consulting business, and its Chairman of the Board of Directors and Chief Executive Officer, John M. Regan, Jr., alleging wrongful termination of his employment and three claims of defamation. Plaintiff's claims for relief arise from the circumstances attendant to MMC's accouncement that plaintiff's employment with MMC was terminated coextensively with the subsequent termination of key employees and its public acknowledgement of $165 million in losses due to unauthorized bond trading. Defendants move for summary judgment, Fed. R. Civ. P. 56(c), on each of the four counts in the Amended Complaint. The material facts relevant to disposition of this Motion are not in dispute.

## Background

Plaintiff Post joined MMC's predecessor, Marlennan Corporation, in 1973 as an Assistant Treasurer. Over the next ten years, he served in various capacities and, in early 1983, was named head of the Investment Management Group ("IMG"). In this position he managed all fiduciary and corporate cash of MMC and its operating companies and was responsible for ensuring that investments were made in compliance with relevant state laws and MMC's investment resolution. The investment resolution mandated that investments could not exceed a two-year term without the approval of MMC's Treasurer or Chief Financial Officer and denied Post or any of his subordinates authorization to borrow money to finance bonds. As the head of the IMG, Post reported to Chester A. Gan, the Company's Treasurer, and he supervised Dorothy M. Conway, the chief bond trader, and other members of the IMG.

On or about March 9, 1984, James W.S. Macdonald, Vice President-Finance, and plaintiff agreed that plaintiff's employment with MMC would be terminated. It was further agreed that plaintiff would be given a "reasonable time," specified as until "about the end of June," 1984, in which to seek new employment. Foster Aff., Exh. 11. In the interim, plaintiff was expected to work conscientiously for MMC and, in exchange, would receive his salary and outplacement assistance, and retain his office and secretary.

Plaintiff asserts, and defendants deny, that on or about March 30, 1984, plaintiff and Edward O. Cole, Vice President-Human Resources, agreed that because of problems incurred in Post's job search, his termination date "would be put off indefinitely as necessary until (plaintiff) was able to find new employment." Plaintiff's Rule 3(g) Statement, ¶ 4. Further, plaintiff was to conduct a diligent search for new employment so as to minimize his time on the MMC payroll after June 30, 1984.

Subsequently, on or about April 5, 1984, Richard Wright, an officer of the brokerage firm of Drexel Burnham Lambert Inc. ("Drexel"), advised plaintiff that Conway had taken financed

positions in government bonds which were unauthorized by MMC and invested in bonds with maturity dates beyond those authorized by MMC. Further, Wright observed that MMC was required, but failed, to disclose approximately $350 million in financings at Drexel in its public financial statements. The following day, Post advised his superior, Gan, of MMC's financed position at Drexel. When confronted, Conway verified she had large financed positions at Drexel as well as at other brokerage houses. Defendant Regan was apprised of the situation and an investigation was undertaken by MMC's inside counsel and the accounting staffs of MMC and its subsidiaries, as well as MMC's outside counsel, Wilkie, Farr & Gallagher, and independent auditors.

As the investigation progressed over the next two months, the estimate of the size of the hidden financings and the amount of the concealed losses associated with them increased. As additional information was uncovered, MMC issued press releases, submitted the requisite filings to the Securities and Exchange Commission, and postponed its Annual Meeting of Shareholders so that a complete presentation concerning the losses and the circumstances surrounding them could be made to the shareholders, the investing public and the insurance industry. Eventually, the loss to MMC was determined to be $165 million.

Soon after the initial disclosure of the unauthorized trading, plaintiff alleges, and defendants deny, that Cole, Vice President-Human Resources, instructed plaintiff to stop his search for other employment and to discontinue his outplacement activities while the unauthorized bond trading was being reported in the newspapers. Plaintiff asserts that, to his detriment, he complied with Cole's directives.

On June 8, 1984, Cole summarily notified plaintiff Post that his employment was terminated, effective immediately, and that the support services previously provided were withdrawn. His compensation, however, continued until June 30, 1984.

Later, on June 8, 1984, defendant Regan presided over MMC's adjourned Annual Meeting of Shareholders at which he read prepared written remarks concerning MMC's losses. Regan noted that, unknown to senior management, certain

individuals in the IMG had engaged in unauthorized trading and financing activities and concealed it by entering incorrect investment data into the record-keeping system. Regan stated that the persons doing the unauthorized investing could have been more closely supervised, and consequently, MMC senior management believed it was appropriate to terminate the employment of certain members of IMG and the Company's Treasurer, and had done so. Defendant Regan, however, at this time, did not mention the names of any terminated employees.

After delivering his prepared remarks and responding to shareholders' questions, Regan was informally questioned by reporters. During this brief exchange with reporters, and later by telephone, Regan was asked if Conway, Post and Gan were among those whose employment had been terminated, and he responded affirmatively.* Subsequently, news of MMC's Annual Meeting and its disclosures of $165 million in losses were reported by media throughout the United States, as well as in the London Financial Times. The press coverage, with respect to Post, was limited to the mention of his name as one of those whose employment had been terminated and a statement of the position he had held at MMC.

## Discussion

*Employment Termination.* Employment at-will is for an indefinite period of time and, absent a clear and definite limitation on the employer's right to discharge, the employee may be terminated at any time, without notice, and for any or no cause. *Wright v. Cayan*, 817 F.2d 999 (2d Cir. 1987); *Sabetay v. Sterling Drug, Inc.*, 69 N.Y. 2d 329, 514 N.Y.S. 2d 209, 506 N.E. 2d 919 (1987); *Murphy v. American Home Products, Inc.*, 58

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* The statements made by defendant Regan were republished in, among others, the following media: The New York Times, The Journal of Commerce, The Wall Street Journal, The New York Post, The Washington Post, Business Insurance and The London Financial Times. The leading wire services, Associated Press and United Press International, also disseminated the statements to newspaper, radio and television subscribers throughout the United States.

N.Y. 2d 293, 461 N.Y.S. 2d 232, 448 N.E. 2d 86 (1983). An employer's unfettered right to discharge an at-will employee is not to be impaired by an implied covenant of good faith. *Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109, 112 (2d Cir. 1985).

Relying on *Weiner v. McGraw-Hill, Inc.*, 57 N.Y. 2d 458, 457 N.Y.S. 2d 193, 443 N.E. 2d 441 (1982), (at-will status may be overcome by evidence of an agreement of employment for a fixed duration or a duration capable of determination), plaintiff maintains that, pursuant to the alleged promise of Cole, there was a contractual obligation to allow Post to remain on MMC's payroll, with support services, until he found new employment. Plaintiff argues that "such time as it took him to find new employment" is a duration capable of determination and, therefore, under *Weiner*, there was an express limitation on MMC's right to discharge him. Plaintiff also contends that by wrongfully discharging plaintiff before he found new employment, defendants breached the implied covenant of good faith which attaches to such contractual relations.

The defendants deny plaintiff was promised continued employment with MMC beyond June 30, 1984, or that he was instructed to cease his efforts to obtain new employment at the time the unauthorized bond trading losses were being investigated and reported. Defendants argue that even if Post's allegation that MMC agreed to extend his employment indefinitely until he was able to secure new employment was true, such condition is insufficient to impose an express limitation on MMC's right of discharge.

The Court finds that even assuming *arguendo* an agreement to extend Post's employment, compensation, support services, and outplacement activities until he obtained new employment, such an agreement would be insufficient to negate plaintiff's at-will status. *See Wright*, 817 F.2d 999 (a letter from an employer according an employee a permanent appointment did not create an employment contract of specific duration), *Hunnewell v. Manufacturers Hanover Trust Co.*, 628 F. Supp. 759 (S.D.N.Y. 1986) (employer's statement that employee would be hired through normal retirement age did not sufficiently state a definite term of employment), *Collins v. Hoselton Datsun, Inc.*,

120 A.D. 2d 952, 503 N.Y.S. 2d 203 (4th Dept. 1986) (employee handbook that provided for "job security" did not bar termination of an at-will employee except for cause, when subject of termination not addressed nor susceptible of being interpreted as requiring just cause). The Court notes, also, that implied contractual obligations may coexist with express provisions which appear to negate them where the relationship of the parties, as structured by the contract, so dictates. *Wakefield*, 769 F.2d 109, 112. It strains common sense to suggest an employer would agree to limit his right to discharge for cause an employee already terminated, but allowed to remain on the payroll while seeking alternative employment.

Plaintiff fails to adduce any evidence that MMC expressly agreed to limit its right to terminate Post and, therefore, he remained an at-will employee whose employment was of indefinite duration. Accordingly, defendants' Motion for summary judgment as to the wrongful termination of employment and breach of implied covenant of good faith claims is granted.

*Defamation Claims.* Plaintiff's three defamation claims differ only in the standard for liability and the type of damages sought: (1) liability without fault, or libel *per se*; (2) liability based on actual knowledge of falsehood or, alternatively, simple negligence; and, (3) liability based on gross irresponsibility "and reckless disregard for the truth" as required for the recovery of punitive damages.

Initially, the Court must determine whether the words complained of are susceptible of the defamatory meaning attributed to them by the plaintiff, and if they are not, innuendo, cannot make them libelous. *Bordoni v. New York Times Company, Inc.*, 400 F. Supp. 1223, 1230 (S.D.N.Y. 1975). Statements are susceptible to defamatory interpretation if they would tend to expose the subject to contempt, aversion or disgrace or induce an evil opinion of him in the minds of reasonable persons, and are false. *See Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y. 2d 369, 379, 397 N.Y.S. 2d 943, 366 N.E. 2d 1299, *cert. denied*, 434 U.S. 969 (1977). The words are to be viewed in context and given their ordinary and usual meaning, *Bordoni*, 400 F. Supp. at 1227, as they would be read and understood by the public to which they are addressed. *November v. Time, Inc.*, 13

N.Y. 2d 175, 244 N.Y.S. 2d 309, 194 N.E. 2d 126 (1963). They are to be read as a whole and with respect to the circumstances of publication. *James v. Gannett Co.*, 40 N.Y. 2d 415, 386 N.Y.S. 2d 871, 353 N.E. 2d 834 (1976).

Plaintiff alleges that defendant Regan defamed him because neither in his remarks at the Annual Meeting of Shareholders nor in later interviews with reporters, did Regan indicate that the agreement to terminate Post's employment had been made prior to the discovery of the unauthorized trading losses; that he was not discharged by reason of involvement in, or knowledge of, the unauthorized bond trading problem; and that, in fact, Post was the person responsible for disclosing the unauthorized trading activities to senior management. Rather, plaintiff contends that taken as a whole and in context, and given their natural and ordinary meaning, Regan's remarks at the shareholders' meeting and his answer to reporters questions, were reasonably understood to

> "accuse plaintiff of being one of the employees who had been dismissed as a result of his role in the unauthorized bond trading and financing which had cost defendant Marsh & McLennan Companies, Inc. a pre-tax loss of approximately $160 million; to declare that plaintiff had participated in the deliberate, fraudulent concealment of such trading by making falsified entries in the record keeping system of the defendant Marsh & McLennan Companies, Inc. such as disguising payments of margin calls as new purchases, and representing next coupon dates as maturity dates; to assert that plaintiff had sought to cover up his participation is unauthorized bond trading and financing and the losses engendered thereby by continuing and expanding such trading; to represent that investigation had shown plaintiff to be equally culpable with Treasurer Chester A. Gan and Assistant Treasurer Dorothy M. Conway for such losses; and to state plaintiff had been 'fired' for those reasons . . . [and to] create the impression that defendants believed plaintiff may have engaged in criminal conduct."

Amended Complaint at 16. Further, plaintiff alleges his status at MMC was a private matter between private parties, not one of public concern, thereby making the defendants strictly liable for the defaming remarks. Due to the alleged defamatory remarks, Post contends he has been unable to obtain employment with any major financial institutions.

Defendants dispute defamation by innuendo and argue that, as evidenced by the $165 million losses due to unauthorized investment activity, Regan's statements were true in that Post certainly did not fulfill his duties and responsibilities as head of the IMG. Defendants contend that a major public corporation's disclosure of a loss of $165 million due to unauthorized trading is a matter of concern to MMC's shareholders, employees, and insurance brokerage clients, whose funds have been entrusted to MMC, as well as to potential investors, and as evidenced by the media interest in the losses and the remedial actions taken by MMC, is a matter of public concern. Therefore, in order to succeed on a defamation claim, the defendants assert plaintiff must demonstrate gross irresponsibility in addition to proving the falsity of defendant Regan's statements.

*Standard for Liability.* Plaintiff argues this is a defamation action by a private citizen against a corporation in the private sector, whose Chairman falsely accused plaintiff of professional incompetence and fraud. It is plaintiff's position that proof of fault and actual damages are not legal prerequisites to recovery under long established New York libel *per se* decisions, citing *Mencher v. Chesley*, 297 N.Y. 94 (1947); *Kleeberg v. Sipsek*, 265 N.Y. 87 (1934); *Nichols v. Item Publishers*, 309 N.Y. 596 (1956); *Macy v. New York World-Tel Corp.*, 2 N.Y. 2d 416 (1957). Defendants, on the other hand, argue that strict liability for defamation is no longer the law of New York, and, to succeed, plaintiff must prove the defendants were grossly irresponsible and the statements were false. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (states may define for themselves an appropriate standard of liability for a publisher or broadcaster of defamatory statements about a private individual, but there cannot be liability without fault); *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y. 2d 196, 379 N.Y.S. 2d 61, 341 N.E. 2d 569 (1975) (when content is of public concern, standard

for liability is gross irresponsibility without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties); *Pollnow v. Poughkeepsie Newspapers, Inc.*, 107 A.D. 2d 10, 486 N.Y.S. 2d 11 (2d Dept. 1985), *aff'd*, 67 N.Y. 2d 778, 501 N.Y.S. 2d 17, 492 N.E. 2d 125 (1986) (a nonmedia individual defendant who utilizes a public medium for the publication of matter deemed defamatory should be accorded the same constitutional privilege as the medium itself).

The Supreme Court in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 86 L.Ed 2d 593 (1985), held that fault must be proved where the subject matter of the speech by a non-media defendant is of sufficient public concern to warrant heightened constitutional protection. Both the plaintiff and the defendants acknowledge the widespread publicity given by the media to the reported losses and subsequent personnel actions. *See Gaeta v. New York News, Inc.*, 62 N.Y. 2d 340, 474 N.Y.S. 2d 82, 465 N.E. 2d 802 (1984) (a determination of what constitutes matters of public concern is an editorial function, and is strong evidence that it is of legitimate public interest). As evidence that the statements were of public concern, defendants submit the testimony of news reporters from Business Insurance, The Journal of Commerce, and the Wall Street Journal, who stated they "covered" the Annual Meeting of Shareholders because the bond losses were of public concern, and that the names and positions of personnel terminated in the wake of the disclosures were also of public concern. McLeod dep. at 20-23; Milligan dep. at 14; Smith dep. at 32-33, 42. In response, plaintiff offers no evidence the statements were not of public concern. Rather, he merely avers that the sheer magnitude of the loss cannot transform it into a matter of public concern. But the testimony of the reporters and the newspapers clippings included in the moving papers are evidence that the size of the loss made the events at MMC of public concern.

Upon all the evidence submitted, the Court finds that a loss to a public corporation of $165 million due to unauthorized trading activities and the subsequent remedial actions taken by the corporation widely reported by the media, are of public concern. *See Luisi v. JWT Group, Inc.*, N.Y.L.J., Sept. 18,

1987, at 7, col. 3 (N.Y. Sup. Ct.). Therefore, the standard for liability is gross irresponsibility without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties. *Chapadeau*, 38 N.Y. 2d 196, 379 N.Y.S. 2d 61, 341 N.E. 2d 569; *Pollnow*, 107 A.D. 2d 10, 486 N.Y.S. 2d 11, *aff'd*, 67 N.Y. 2d 778, 501 N.Y.S. 2d 17, 492 N.E. 2d 125. Accordingly, defendants' Motion for summary judgment as to the second and third causes of action is granted.

The court need not decide whether Regan's remarks are susceptible to a defamatory interpretation, because defendants' Motion can be decided on other grounds. Even if the statements are found to be defamatory, in order to succeed, the plaintiff must show that the defendants conducted and reported the results of their investigation in a grossly irresponsible manner. *See Luisi*, N.Y.L.J., Sept. 18, 1987. Defendants have come forward with admissible evidence that the investigation and subsequent reporting were conducted in a careful, responsible manner. The investigation was conducted over a two-month period, and was not done hastily. It involved interviews of relevant parties and reviews of transactions and documents by inside and outside counsel, by staff and independent accountants, as well as by senior management. The prepared remarks were reviewed by those same parties. In opposition, plaintiff submitted Regan's testimony that the termination on June 8, 1984 was a confirmation of the decision made in early March to terminate Post. This, however, is not inconsistent as MMC did not relinquish its right to terminate plaintiff for cause prior to June 30, 1984. The fact that Post was not a party to the concealed, unauthorized trading is irrelevant as he was charged with the reponsibility of enforcing MMC's investment resolutions and complying with relevant state laws. Regan merely stated that as a result of the investigation, senior management agreed that it was appropriate to take certain actions regarding personnel, and that Post was one of the key personnel terminated. To conclude by innuendo from this that Post was an active participant in the unauthorized activity "stretch(es) an innuendo beyond its outer limits," and is unwarranted. *Bordoni*, 400 F. Supp. at 1230. It seems appropriate to conclude the

employment period of an employee, especially one already terminated, who is charged with responsibility for the conduct of his subordinates, where the conduct was outside the scope of company policy and led to losses of $165 million.

The Court finds that, based on the entire record, neither Regan nor MMC acted in a grossly irresponsible manner, and plaintiff has not, by a preponderance of the evidence, shown that they did. As plaintiff cannot demonstrate gross irresponsibility, it follows he cannot meet the higher standard of actual malice. Accordingly, defendants' Motion for summary judgment as to the fourth claim is granted.

Based on the foregoing, the defendants' Motion for summary judgment is granted in its entirety and the Complaint is dismissed.

The Clerk is directed to enter judgment accordingly, and to forward a copy of this Order to counsel for each party.

SO ORDERED.

DATED: New York, New York
January 15, 1988

/s/ RICHARD J. DARONCO
Richard J. Daronco
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 9185 RJD

RICHARD O. POST, JR.,

*Plaintiff,*

—against—

JOHN M. REGAN, JR. and
MARSH & MCLENNAN COMPANIES, INC.,

*Defendants.*

JUDGMENT

Defendant(s) having moved for summary judgment and the said motion having come before the Honorable Richard J. Daronco, U.S.D.J., and the Court thereafter on January 20, 1988, having handed down its memorandum decision and order, granting the said motion in its entirety; dismissing the complaint and directing the Clerk to enter judgment accordingly, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is dismissed.

DATED: New York, N.Y.
January 22, 1988

/s/ RAYMOND F. BURGHARDT
Raymond F. Burghardt
*Clerk*

THIS DOCUMENT WAS ENTERED ON THE
DOCKET ON 1-26-88

[Letterhead of Walker & Corsa]

February 10, 1988

Hon. Richard J. Daronco
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Post v. John M. Regan, Jr.
and Marsh & McLennan Companies, Inc.
84 Civ. 9185 (RJD)
Our File: 963-1

Honorable Sir:

We are the attorneys for plaintiff in this libel and breach of contract action in which counterclaims have been interposed by the corporate defendant.

As Your Honor will recall, the Court has granted defendants' motion for summary judgment dismissing the four counts of the amended complaint by memorandum order and decision dated January 15, 1988, filed January 20, 1988, with the Clerk of the Court entering judgment dismissing the complaint on the docket on January 27, 1988.

We have recommended and have been authorized to prosecute an appeal. We write to respectfully request that Your Honor issue a "certificate" in accordance with Rule 54(b) of the Federal Rules of Civil Procedure, including Rule 54(b) language to the effect that the court has directed the entry of final judgment dismissing the complaint and has determined that there is no just reason for delay. Our adversaries we understand have no objection to our request to the Court.

Your Honor's issuance of a "certificate" will remove any questions as to appealability at this stage of the proceedings,

and, it is respectfully submitted, conserve the time of court and counsel by obviating either an unnecessary trial of the counterclaims if your decision is affirmed, or two separate trials in the same case, if your decision is reversed.

Very truly yours,

WALKER & CORSA

BY: CHARLES L. TROWBRIDGE
Charles L. Trowbridge

CLT:vc
cc: David L. Foster, Esq.
Willkie, Farr & Gallagher
One Citicorp Center
153 East 53rd Street
New York, New York 10022

Upon the parties' joint application, as contained herein, the Court finds that there is no just reason for delay and directs the Clerk, pursuant to Fed.R.Civ.Pro. 54(b), to enter a final judgment dismissing the complaint.

SO ORDERED.

Dated: New York, New York
February 22, 1988

/s/ RICHARD J. DARONCO
Richard J. Daronco,
U.S.D.J.

The Clerk is directed to forward a copy of this indorsement to counsel for each party.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

88-7260

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-Seventh day of June one thousand nine hundred and eighty-eight.

Present: HONORABLE JON O. NEWMAN,
HONORABLE AMALYA L. KEARSE,
HONORABLE RICHARD J. CARDAMONE
*Circuit Judges.*

RICHARD O. POST, JR.,

*Plaintiff-Appellant,*

—v.—

JOHN M. REGAN, JR. and
MARSH & MCLENNAN COMPANIES, INC.,

*Defendants-Appellees.*

ORDER

Richard O. Post, Jr. appeals from a judgment of the District Court for the Southern District of New York (Richard J. Daronco, Judge) dismissing his action for wrongful termination of employment and defamation against his former employer, Marsh & McLennan Companies, Inc. ("MMC"), and its Chairman and Chief Executive Officer, John M. Regan, Jr. Post

contends that the District Court erred in granting summary judgment on the wrongful termination claim because a jury reasonably could have concluded that he enjoyed something more than at-will employment status based on representations by MMC that Post would have a "reasonable" time in which to obtain a new position before his termination took effect. Post contends that summary judgment was also inappropriate on his second, third, and fourth claims, which alleged alternative theories of defamation stemming from the defendants' public announcement of his termination in connection with unauthorized trading activities at MMC. We reject these contentions and affirm.

1. *Wrongful Termination of Employment.* New York law does not recognize an implied covenant of good faith in employment contracts. *See Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 335, 514 N.Y.S.2d 209, 212 (1987); *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 304-05, 461 N.Y.S.2d 232, 237 (1983). Instead, the Court of Appeals has adhered to the long-settled rule that "where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason." *Murphy v. American Home Products Corp.*, *supra*, 58 N.Y.2d at 300, 461 N.Y.S.2d at 235 (citations omitted). *See Sabetay v. Sterling Drug, Inc.*, *supra* (discussing strictness of New York rule); *Martin v. New York Life Insurance Co.*, 148 N.Y. 117 (1895).

In *Murphy*, after noting the general requirement that an employment contract must expressly establish a term of fixed duration in order to avoid at-will status, the New York Court of Appeals acknowledged an additional ground that would support an action on the contract: "Of course, if there were an express limitation on the employer's right of discharge it would be given effect even though the employment contract was of indefinite duration." 58 N.Y.2d at 305, 461 N.Y.S.2d at 237. *See Wright v. Cayan*, 817 F.2d 999, 1003 (2d Cir.), *cert. denied*, 108 S. Ct. 157 (1987). This rule is illustrated by the Court of Appeals holding in *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 457, N.Y.S.2d 193 (1982), in which plaintiff was permitted

to sue on his employer's express assurance, contained in numerous memoranda, that he would not be terminated without just cause.

Appellant's attempt to enlist *Weiner* in his effort to avoid summary judgment in the pending case is unavailing. At best, the factual allegations tend to prove only that after the decision was made in March that Post's employment with MMC would end, Post was told on two occasions by Edward Cole, an MMC Vice President, that he would be retained with pay until June 30, 1984, or a reasonable time thereafter, in order to facilitate Post's transition. Post in fact received compensation from MMC through June 30, 1984. Any claim to a contractual right to employment beyond that date is groundless. The alleged assurances by Cole that the June 30 termination date was flexible and would be extended, if necessary, were a gratuitous accommodation; they fail to satisfy the requirement of an express limitation on the employer's right of termination, either by providing a fixed term of employment or a promise that termination would be only for cause. *See Wright v. Cayan*, *supra*, 817 F.2d at 1003 (assurance of "permanent appointment" does not limit employer's right to terminate); *Hunnewell v. Manufacturers Hanover Trust Co.*, 628 F. Supp. 759, 760 (S.D.N.Y. 1986) (promises to employ plaintiff for "full working life" and "through normal retirement age" do not create express term of employment).

Finally, Post's analogy to the "detrimental reliance" shown in *Weiner* is unpersuasive. First, Post cites no authority for the proposition that reliance itself, absent an express limitation on the power to terminate, will defeat at-will status. Moreover, the reliance in that case is of a wholly different character than that alleged here. The plaintiff in *Weiner* was induced to leave his prior job upon the assurance that he would not be terminated without cause and rejected other offers of employment in reliance on that written assurance. Post merely alleges that he broke off talks with a potential employer at the request of Cole when the unauthorized transactions were discovered "in order to avoid interviewing during this sensitive period." Affidavit of Richard O. Post, Jr. at 43, Joint Appx. at 461. Cole's request, even if coupled with a statement that Post would be given more

time to search for a job later, only serve to illustrate the *absence* of any fixed term of employment specified for Post during this period of crisis and flux at MMC.

2. *Defamation.* As an initial matter, we agree with the District Court that the appellees' allegedly defamatory speech undoubtedly addressed a matter of "public concern" sufficient to trigger heightened constitutional protections. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Appellees' speech disclosed details concerning "a loss to a public[ly traded] corporation of $165 million due to unauthorized trading activities and the subsequent remedial actions taken by the corporation widely reported by the media." 677 F. Supp. at 208. No one familiar with events on Wall Street in recent years can accept appellant's characterization of appellees' speech as concerning matters of purely private interest. The "commercial" subject matter itself does not automatically divest the speech of its public importance. *Cf. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra*, 472 U.S. at 758 n.5, 762 (discussing constitutional hierarchy of speech categories). The fiscal and ethical integrity of this country's large financial institutions is a matter of grave public importance and concern.

Because a state may not allow recovery of presumed and punitive damages "absent a showing of 'actual malice' " in a defamation action where the challenged expression related to a matter of public concern, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra*, 472 U.S. at 756 (discussing holding of *Gertz v. Robert Welch Inc., supra*), the District Court properly dismissed Post's defamation counts alleging libel *per se* and simple negligence. Under New York law implementing the constitutional restraints reflected in the "actual malice" standard, a plaintiff may recover only if the defendants "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61, 64 (1975).

Appellant contends that the New York courts use the *Chapadeau* standard only in defamation actions involving "media defendants," and argues that some lesser though unspecified standard is applicable to the "non-media" defendants in the pending case. This contention is flawed in two respects. Most importantly, the *Dun & Bradstreet* decision unequivocally indicates that the critical issue in determining the required standard for recovery of presumed or punitive damages is whether the subject matter of the speech is one of public concern. The inquiry focuses on the subject matter of the expression, not the identity of the speaker. Secondly, New York has applied the *Chapadeau* standard to non-media defendants. *See Pollnow v. Poughkeepsie Newspapers, Inc.*, 107 A.D.2d 10, 486 N.Y.S.2d 11 (2d Dep't 1985), *aff'd*, 67 N.Y.2d 778, 501 N.Y.S.2d 17 (1986) (gross irresponsibility standard used where non-media defendant's speech published as "letter to editor" involved matter of public concern); *Luisi v. JWT Group, Inc.*, N.Y.L.J., Sept. 18, 1987, at 7, col. 3 (N.Y. Sup. Ct.), *aff'd mem.*, ____ A.D.2d ____, 525 N.Y.S.2d 454 (1st Dep't 1988). The liability standard applied to the appellees' motion for summary judgment was correct.

Finally, we agree that summary judgment was appropriate on the facts of this case. A careful and responsible investigation into the unauthorized trading affair was conducted by MMC with the aid of outside counsel and an independent accounting firm. MMC concluded that the unauthorized transactions resulted from the unethical (and perhaps criminal) conduct of a small number of its employees, coupled with inadequate supervision by those charged with that responsibility. Post fell into this latter group. It is true, as Post claims, that his name was mentioned to reporters as one of those discharged without any distinction being made between the alleged wrongdoers and their supervisors and without disclosure of the fact that Post had plans, before the unauthorized trading was discovered, to leave MMC for apparently unrelated reasons at some unspecified future date. Even if a defamatory interpretation can be given to Regan's speech and his subsequent comments to reporters, however, these factual omissions cannot as a matter of law satisfy the gross irresponsibility standard. Appellees

were not required to specify as to each discharged employee the precise degree of culpability involved. Nor is the fact that Post had plans to leave MMC before discovery of the unauthorized transactions relevant to the circumstances under which he was (by his own characterization) prematurely terminated once the transactions were revealed.

Appellant's contention concerning inadequate discovery is without merit, as is his claim that the District Court relied on privileged material in dismissing the action, *see* 677 F. Supp. at 209 ("Defendants have come forward with *admissible* evidence that the investigation and subsequent reporting were conducted in a careful, responsible manner." (emphasis added)).

The judgment of the District Court is affirmed.

/s/ JON O. NEWMAN

/s/ AMALYA L. KEARSE

/s/ RICHARD J. CARDAMONE
*Circuit Judges.*

*N.B. This Summary Order will not be published in the Federal Reporter and Should not be cited or otherwise relied upon in unrelated cases before this or any other court.*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Sixth day of September one thousand nine hundred and eighty-eight.

RICHARD O. POST, JR.,

*Plaintiff-Appellant,*

—v.—

JOHN M. REGAN, JR. and
MARSH & MCLENNAN COMPANIES, INC.,

*Defendants-Appellees.*

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Richard O. Post.

Upon consideration by the panel that heard the appeal, it is ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to judges of the court in regular active service and to any other judge that heard the appeal and no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith,
*Clerk*

## STATUTORY PROVISIONS

Fed. Rule Civ. Proc. Rule 26(b)(3) states in pertinent part as follows:

**Rule 26. General Provisions Governing Discovery**

**(b) Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(3) ***Trial Preparation: Materials.*** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation ot the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital

of an oral statement by the person making it and contemporaneously recorded.

Fed. Rule Civ. Proc. Rule 56, 28 U.S.C.A. states in pertinent part as follows:

**Rule 56. Summary Judgment**

**(a) For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

**(b) For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

**(c) Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**(d) Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial contro-

versy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

**(e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

**(f) When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

## CONSTITUTIONAL PROVISIONS

**U.S. Const. amend. I** states in pertinent part as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

**U.S. Const. amend. V** states in pertinent part as follows:

> . . . nor be deprived of life, liberty, or property, without due process of law . . .

**U.S. Const. amend. XIV § 1** states in pertinent part as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

No. 88-949 (2)

Supreme Court, U.S.
FILED
JAN 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD O. POST, JR.,

*Petitioner,*

—v.—

JOHN M. REGAN, JR. and
MARSH & MCLENNAN COMPANIES, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the courts below correctly grant and affirm summary judgment dismissing plaintiff's libel claims without affording plaintiff access to an admittedly privileged memorandum where (i) plaintiff had acknowledged that he had a full and complete opportunity to conduct discovery of information purportedly contained in the privileged memorandum, (ii) the content of that privileged communication was never relied upon by defendants as justification for the challenged statements or in defense of plaintiff's claims, and (iii) the courts below specifically excluded the privileged communication in considering the summary judgment motion?

2. Did the courts below err when they applied, in this diversity libel action, well-settled New York law, which requires a private plaintiff to demonstrate that, in matters of public concern, a defendant acted with "gross irresponsibility" or "actual malice" in order to recover for libel?

3. Does the determination of the courts below, that plaintiff had failed to raise issues of fact warranting a trial regarding the existence of "gross irresponsibility" under New York law, present an issue for review?

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

**No. 88-949**

RICHARD O. POST, JR.,

*Petitioner,*

—v.—

JOHN M. REGAN, JR. and
MARSH & MCLENNAN COMPANIES, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

### PRELIMINARY STATEMENT

Respondents, John M. Regan, Jr. and Marsh & McLennan Companies, Inc., respectfully request that this Court deny the Petition for writ of certiorari seeking review of the Order of the United Stated Court of Appeals for the Second Circuit in this case.

## STATEMENT OF THE CASE

### A. Background Facts

This action arises from the much publicized 1984 loss to Marsh & McLennan Companies, Inc. ("MMC" or the "Company") of approximately $165 million resulting from unauthorized investment activities within the Investment Management Group ("IMG") of the Company. Petitioner Richard O. Post, Jr. ("Post") was head of the IMG. In that capacity, Post managed all fiduciary and corporate cash of MMC and its operating companies and throughout 1983 and 1984 was responsible for ensuring that investments were made in compliance with relevant state laws and the Company's investment resolutions. R. at 4a.[1] Post reported to the Company's Treasurer, Chester A. Gan ("Gan") and supervised Dorothy M. Conway ("Conway"), the chief bond trader, and other members of the IMG. *Id.*

The loss arose from the IMG's covert practice of borrowing either all or the major portion of the purchase price of various bonds. Neither Post nor his subordinates had authorization to borrow money to finance bonds. On April 5, 1984, Richard Wright ("Wright"), Chief Financial Officer of Drexel Burnham Lambert Incorporated ("Drexel"), telephoned Post and advised him that the IMG's financed securities positions at Drexel were much larger than Post had led him to believe during their conversations in February, 1984. R. at 4a-5a. In addition, Wright informed Post that MMC's 1983 public financial statements failed to disclose, as required, the existence of approximately $350 million in financings at Drexel. *Id.* After further discussions with Wright, and no doubt aware that the unauthorized transactions would soon become known to the Company, Post finally told Gan. R. at 5a. John M. Regan, Jr. ("Regan"), then Chairman of the Board of the Company, was advised, and an investigation was immediately undertaken by, among others, the Company's outside counsel, Willkie Farr &

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1 References are to the decisions of the courts below annexed as the appendix to Post's Petition, hereinafter cited as "R at _____."

Gallagher, and its independent auditors, Arthur Andersen & Co., as well as the Company's inside counsel and the accounting staffs of MMC and its subsidiaries. *Id.*

The publicly disclosed investigations over the ensuing two months exposed the magnitude of the unauthorized financing transactions entered by the IMG and concealed from the Company, which ultimately were found to have amounted to $2 billion. As additional information surfaced, MMC issued press releases, made the requisite filings with the Securities and Exchange Commission, and postponed its Annual Meeting of Shareholders so that a complete presentation concerning the losses and the circumstances surrounding them could be made to its shareholders, the investing public and the insurance industry. R. at 5a.

On June 8, 1984, Regan presided over the Company's adjourned Annual Meeting of Shareholders at which he read prepared remarks concerning the Company's losses. R. at 5a-6a. Regan noted that, unknown to senior management, certain individuals in the IMG had engaged in unauthorized trading and financing activities and concealed those activities by entering incorrect investment data into the record-keeping system. *Id.* Regan stated that the persons engaged in the unauthorized investing could have been more closely supervised, and, consequently, the Company's senior management believed it was appropriate to terminate the employment of certain members of the IMG and the Company's Treasurer, and had done so. *Id.* Regan did not identify by name any of those whose employment had been terminated. *Id.*

After delivering his prepared remarks and responding to shareholders' questions, Regan was informally questioned by the media. R. at 6a. During this brief exchange with reporters, and later by phone, Regan confirmed, in response to a specific request that the persons terminated included certain individuals *named by the reporter*, that Post was among them. The subsequent press coverage, with respect to Post, was limited to the mention of his name as one of those whose employment had

been terminated and a statement of the position he had held at MMC. *Id.*

These simple and undisputed facts admit of only one conclusion: Post failed to do his job of supervising the department for which he singularly was responsible and his employment was terminated as a result. Contrary to Post's unfortunate distortion of Regan's remarks, the record below is clear that Regan said no more in his address to the Company's shareholders nor later to the press.

**B. Nature of the Action**

On December 20, 1984, Post commenced a diversity action seeking damages arising out of the termination of his employment with the Company. R. at 3a. Post's Complaint alleged four separate causes of action. The First Claim for Relief alleged that the termination of his employment and compensation as of June 30, 1984, was "wrongful" and constituted a breach of an implied obligation of good faith and fair dealing. The Second, Third and Fourth Claims for Relief alleged that Regan defamed him by confirming to the media in response to their inquiries, that Post was among those whose employment had been terminated. *Id.* The three libel claims differed only in the standard of liability Post sought to impose and the amount of damages.

**C. The Proceedings Below**

On June 30, 1985, MMC and Regan answered the Complaint and advanced seven counterclaims against Post grounded in his failure to carry out his responsibility of supervising the trading and investing of his immediate subordinate Conway (First, Second and Third Counterclaims), and his failure to disclose Conway's unauthorized financing transactions to senior management as well as his circulation of reports to the Company's and the Company's subsidiaries' financial officers which misrepresented the nature of Conway's trading, profits earned and the composition of the investment portfolios. (Fourth, Fifth, Sixth and Seventh Counterclaims).

The parties conducted more than two and one-half years of discovery, including depositions of Regan and reporters who published accounts of MMC's $165 million loss. At his deposition, Regan, in contrast to Post's distortions of the record, succinctly stated the reasons for termination of Post's employment—he did not do his job and, as a result, the Company lost $165 million.

On August 28, 1987, after discovery had been closed, the Company and Regan moved for summary judgment dismissing each of the claims in the Complaint on the grounds that after lengthy discovery Post had failed to adduce admissible factual evidence of sufficient quality and quantity on each and every element of his claims; that Post had failed to identify a single material fact in dispute requiring a trial of his claims; and that based upon the uncontested record the Company was entitled to judgment dismissing each of the claims in the Complaint as a matter of law. In stark contrast to Post's disingenuous contention, Regan and the Company never argued at any point in their memorandum in support of their motion or elsewhere that Regan relied on reports of counsel in making the allegedly libelous remarks. Indeed, Regan testified to the contrary, as Post is well aware.

Only after discovery had been closed and on the eve of the return date of the summary judgment motion, and perhaps sensing the inevitable, Post moved before Judge Daronco seeking again to depose Regan on his "state of mind," precisely the same subject that he had acknowledged he had covered at length at Regan's deposition two and one-half years earlier, and to obtain access to a privileged document, a memorandum of counsel, of which he had been aware for more than two years. Post had, a year and one-half earlier, made the same request before Judge Griesa, before whom the case was then pending, and had withdrawn the application after discussing with Judge Griesa the fact that he had fully and sufficiently examined Regan. Judge Griesa, as the record demonstrates, did not "defer to trial" the issue of the privileged memorandum, a falsification concocted by Post. Rather, Post withdrew his request along with his application to redepose Regan. Equally specious

is Post's bald assertion that Judge Daronco denied Post's application in all respects other than for the privileged memorandum. The simple truth is that, as Judge Daronco's order states, Judge Daronco denied Post's application in its entirety, including his request for the privileged memorandum. R. at 1a-2a. Post did not move for reconsideration.

**D. The District Court's Decision**

On January 20, 1988, Judge Daronco granted Respondents' motion for summary judgment and dismissed the Complaint in its entirety holding that the material facts relevant to the disposition of the motion were not in dispute and that Regan and MMC were entitled to judgment on each of the claims as a matter of law. R. at 3a-13a. In particular, in dismissing the Second and Third Claims for Relief, the District Court held that the reporting of the bond loss and the remedial action attendant thereto, which were widely reported by the media, clearly involved matters of public concern. *Id.* at 11a. The Second and Third Claims, grounded in libel and based upon theories of strict liability and simple negligence, therefore, were dismissed on the grounds that, in matters of public concern, New York law required proof of a higher degree of fault, *i.e.*, "gross irresponsibility." *Id.* at 11a-12a.

As a reading of Judge Daronco's order and opinion unequivocally demonstrates, the District Court did not consider the "gross irresponsibility" standard applicable to Respondents because Regan's remarks were publicized by the media as Post asserts. Rather, Judge Daronco relied upon and cited unchallenged New York law holding that, in matters of public concern, "gross irresponsibility" was the appropriate standard of liability to be applied to non-media defendants. R. at 11a-12a.

In disposing of Post's Fourth Claim for Relief (liability based on gross irresponsibility and reckless disregard for the truth), the District Court concluded that defendants had come forward with uncontroverted *admissible* evidence that the investigation and subsequent reporting of the Company's losses had been conducted in a careful, responsible manner. R. at 12a. In no

other words, Judge Daronco explicitly stated that he had not relied upon the *in camera* inspection of the privileged memorandum, as Post speculates, and had no need to.

If it were this Court's business to review the fact record, as Post suggests, it would quickly conclude that there is ample evidence to support Judge Daronco and not a scintilla of evidence—not even an *argument*—that the investigation was other than careful and responsible. Specifically, Respondents provided extensive factual detail, including deposition testimony, public filings, press releases and other reports, describing the formation of a task force, which included outside counsel of the Company, officers of the Company and its subsidiaries, and inside and outside accountants, set up to conduct a "far-reaching" investigation into the surrounding circumstances of the bond loss and detailing the immediate corrective measures undertaken by the Company to reduce its exposure upon discovery of the unauthorized transactions. In fact, the investigation was fully described and publicly disclosed in the challenged Annual Meeting remarks.

Further, the District Court did not "ignore" evidence purportedly exonerating Post as he claims without basis in fact. The issue presented by the New York "gross irresponsibility" standard was not whether defendants might have been wrong about Post, but whether an erroneous statement (the *sine qua non* of libel) was based on inadequate inquiry. While Judge Daronco would no doubt have been justified in granting summary judgment simply on the absence of a false statement, the actual basis of the decision—which Post essentially obfuscates or ignores because it is so unequivocally sound—was that defendants' statement was not shown to have been made without an investigation having the quality required by New York law. As the District Court succinctly phrased it:

> The Court finds that, based on the *entire* record, neither Regan nor MMC acted in a grossly irresponsible manner, and plaintiff has not, by a preponderance of the evidence, shown that they did. As plaintiff cannot demonstrate gross irresponsibility, it follows he cannot meet the higher stan-

> dard of actual malice. Accordingly, defendants' Motion for summary judgment as to the fourth claim is granted.

R. at 13a (emphasis added).

**E. The Second Circuit's Decision**

By Order, dated June 27, 1988, the United States Court of Appeals for the Second Circuit affirmed the decision of the District Court granting summary judgment dismissing Post's claims. Addressing the propriety of the standard of liability applied by the District Court, the Second Circuit held that the alleged defamatory speech "undoubtedly addressed a matter of 'public concern' " and, therefore, the District Court correctly ruled that, under New York law, Post would be required to demonstrate that Regan and MMC acted with "gross irresponsibility" in connection with the challenged statements. R. at 20a. The District Court accordingly had correctly dismissed Post's libel counts grounded in strict liability and simple negligence.

As to Post's libel claims based on "gross irresponsibility" and "actual malice," the Second Circuit concluded that the record upon which the District Court had relied amply supported its finding that the investigation of the Company's losses and the reporting of the unauthorized investment activities were conducted in a careful and responsible manner. Further, the court stated, no purported "evidence" or rationale which had been proposed by Post met, as a matter of law, the "gross irresponsibility" standard. Accordingly, the District Court had properly granted summary judgment in defendants' favor. R. at 21a-22a.

As is readily apparent from even a cursory review of the Second Circuit's Order, the Second Circuit did not "overlook" Post's request for actual damages as Post claims. Nor did the Second Circuit hold that "actual malice" was "constitutionally required" for Post to succeed, as Post attempts to suggest by quoting the Second Circuit out of context. The Second Circuit, as did Judge Daronco, simply applied controlling New York law.

The Second Circuit also soundly rejected Post's contention that MMC or Regan had relied upon the content of any privileged material as justification for Regan's remarks or in defense to Post's claims. The Second Circuit further found wholly lacking in merit, Post's assertion that the District Court must have relied upon the privileged memorandum in dismissing the action, ruling that the District Court's conclusions were based upon its consideration of the full record of admissible evidence (which Post blatantly disregards) and not any privileged matter.

In denying Post's Petition for Rehearing and Suggestion for Rehearing *En Banc* on September 6, 1988, the Second Circuit again reinforced the lack of merit to Post's contentions.

## SUMMARY OF REASONS WHY POST'S PETITION SHOULD BE DENIED

This is a diversity suit decided by application of New York state law. It was correctly decided, and there is not one hint of doubt as to its correctness from any of the federal judges in the District Court, the Court of Appeals panel or the other Court of Appeals judges who denied rehearing *en banc*.

Apart from the correctness of the decision, it is plainly an inappropriate choice for certiorari, under the familiar principles which this Court has articulated. In discussing the standards governing review by certiorari, the Court has made clear that it will decline to exercise its jurisdiction to review by certiorari in all but the most extraordinary cases. Thus, the Supreme Court has indicated that jurisdiction to review by certiorari should be sparingly exercised, and only in cases of peculiar gravity and general importance, or in cases affecting relations with foreign governments, or to secure uniformity of decisions. Sup. Ct. R. 17; *Forsyth v. Hammond*, 166 U.S. 506 (1897). Measured against the foregoing standard, Post's claims fall far short of demonstrating an appropriate case for review.

Post has failed to demonstrate that he was not afforded a full and complete opportunity to discover information concerning the challenged libelous statements purportedly contained in the

privileged memorandum. In any event, the privileged memorandum was not discoverable. Respondents never relied upon the contents of that document in any briefing or argument as justification for the challenged statements, or in defense of Post's claims, and the courts below correctly dismissed Post's claims based upon the uncontested record of *admissible* evidence and explicitly disclaimed any reliance upon any privileged matter.

The District Court and Second Circuit correctly applied well-settled New York law that limits a private plaintiff's right to recover for alleged libel against a non-media defendant where, as here, the challenged speech clearly involved a matter of public concern, except upon a showing that the defendant "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." Post simply failed to meet this standard of fault.

The courts below weighed the full record of admissible evidence and correctly concluded that based upon this uncontested record, Respondents were entitled to judgment dismissing Post's claims as a matter of New York law. There is simply no legitimate reason for this Court to expend its resources to review an entire record of facts peculiar to an individual diversity case to determine whether the District Court and the Second Circuit correctly weighed that record in applying a state court defined rule of law.

## POINT I

## POST HAS NOT DEMONSTRATED THAT THE WITHHOLDING OF AN ADMITTEDLY PRIVILEGED MEMORANDUM, NOT RELIED UPON BY RESPONDENTS AND SPECIFICALLY EXCLUDED FROM CONSIDERATION BY THE COURTS BELOW, PRESENTS ANY "ISSUE" APPROPRIATE FOR REVIEW.

In his Petition, with a breadth and imprecision of argument more appropriate for a jury summation, Post presents the grip-

ping picture of a plaintiff denied access to a supposedly decisive document which he says had been relied upon by his adversaries and the courts below. How could the courts below have perpetrated such plain unfairness, without at least a whimper of protest from one of the Judges?

Of course the picture is false. Before demonstrating its falsity, Respondents note that questions of application of the attorney-client privilege rarely merit Supreme Court review. *Upjohn Co. v. United States*, 449 U.S. 383 (1981), exemplifies the rare exception. If the Supreme Court wishes again to consider the attorney-client privilege, it should presumably do so because the case reviewed enunciates a novel or questionable legal standard. The Petition does not suggest that this is such a case; indeed, Post contends that the District Court did not rule one way or the other on his belatedly renewed discovery initiative. Furthermore, the very factors in this case which refute the Petition's presentation of egregious unfairness also brand the ruling below as singularly inappropriate for consideration by this Court. In essence, the document issue is an after-thought, inflated by Post to amplify an unmeritorious appeal. Contrary to the Petition, pursuit of the document had been abandoned by Post at the discovery stage of the case; Respondents did not rely on the content of the document as justifying the supposedly libelous statements, and the District Court's *explicit* denial of reliance on the document was affirmed by the Court of Appeals.

As to the supposed reliance on the document by defendants, Post's contention is belied by the record and has been rejected by two District Courts and by the Second Circuit. Regan has testified that he drafted his remarks, and that they were reviewed by senior management of the Company and inside and outside counsel. There is no evidence whatsoever that Regan even saw, let alone read or relied upon, the privileged memorandum at issue. There certainly is nothing in the record to support Post's fanciful assertion that the memorandum was "admittedly shown to [R]espondent Regan shortly before the making of the defamatory remarks." *See* Pet. at 11. Indeed, it

is astonishing that Post has the temerity to make such a clearly erroneous statement.

Equally false is Post's concocted explanation of his abandonment of the pursuit of the document. Judge Griesa, contrary to Post's claim, did not defer ruling on Post's request for access to the memorandum until trial. *See* Pet. at 11. Post had argued before Judge Griesa that he must obtain the memorandum to examine Regan's "state of mind" when he made the purportedly libelous, albeit to this date undefined, remarks on June 8, 1984. After admitting to Judge Griesa that he had fully examined Regan's "state of mind" in a deposition taken the year before, he withdrew his application, and allowed discovery to be closed without pursuing the matter further.

With discovery closed, the time was ripe for defendants' summary judgment motion. Post reacted in a manner typical of parties facing such a motion; he sought additional discovery in the hope of staving off summary judgment. Post urged before Judge Daronco precisely those arguments which he had abandoned before Judge Griesa. Judge Daronco clearly rejected Post's argument and so stated in his order. R. at 1a., 2a. Post's assertion that Judge Daronco "never decided [P]etitioner's motion for its [the memorandum] production," Pet. at 11, is directly contradicted by the record.

A further false facet of Post's gripping picture of unfair discovery denial is the distortion that the document he now seizes upon constituted uniquely important evidence. The inherent logical flaw in that argument was clear to the courts below. Post does not claim that Regan failed to provide sufficient testimony. Nor does he claim, and cannot, that Regan did not testify regarding his reasons for believing that the termination of Post's employment was appropriate. Indeed, Regan made no mystery of his views—the IMG's unauthorized activities had cost the Company $165 million, and Post was in charge of supervising their conduct to ensure that all investments were in accordance with MMC's policies. In short, he failed to do his job.

Since there is no evidence that Regan had ever read the document, let alone that he had it in mind, when he acted and spoke, the "state of mind" argument at best rests upon conjecture. Even if we indulge such a conjecture by Post, and suppose that he further entertains the wholly fanciful notion that Regan may have lied at his deposition, Post fails to identify particular testimony which could be probed by the document. In any event, there is simply no precedent or policy to support the proposition that a party's desire to test the probity of an adverse witness' recollection justifies eviscerating the attorney-client privilege. Such an exception would swallow the rule.

There is, of course, a "shield not sword" waiver doctrine concerning the attorney-client privilege, *see Hunt v. Blackburn*, 128 U.S. 464 (1888), but it cannot be applied on this record. Neither Regan nor MMC, as the record before the courts below confirms, has ever asserted any reliance on a report of counsel as a defense, argument or justification. The element of reliance is solely in the mind of Post's counsel. Accordingly, the courts below properly rejected the same inapplicable cases relied on by Post here.

Perhaps Post's greatest violence to the record is the claim that the courts below based their rulings on that privileged material. The orders of both courts expressly belie such a frivolous contention. In examining whether Regan's and MMC's conduct was "grossly irresponsible," Judge Daronco stated that "defendants have come forward with admissible evidence that the investigation and subsequent reporting were conducted in a careful, responsible manner." R. at 12a. Since Post had raised the issue of the attorney-client privilege in connection with the privileged memorandum submitted to Judge Daronco *in camera*, it is plain that Judge Daronco used the word "admissible" for the specific purpose of demonstrating that he had not relied on the document, the privileged and hence unadmissible character of which he was simultaneously sustaining. The Second Circuit understood Judge Daronco's carefully phrased statement to mean just that—that he only relied on *admissible* evidence, not the memorandum, and rejected Post's claim of error on appeal as without merit. *See* R. at 22a.

Post says there was no such admissible evidence, and invites this Court to review the fact record. However, both courts below took pains to point out details from the record elaborating on the care and scope of MMC's well-documented and publicly-disclosed investigation. Post's claim is made yet more outrageous by the fact that the Annual Meeting remarks that he challenges contained a full depiction of the investigation and Post himself testified at length regarding the details of the investigation. Simply put, Post was not deprived of any material information nor did the courts below impermissibly rely on evidence not in the record. Post's contentions present no issue for review.

As should be apparent from the foregoing, the purported conflict with the decisions of this Court, the First Circuit and Rule 56(f) of the Federal Rules of Civil Procedure that Post mentions is purely another misguided attempt to create an issue where none exists. *See* Pet. at 10. In any event, the cases he relies on have no bearing on the matters at hand. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) never considered any issue concerning privileged matter; therefore, no conflict could logically exist. In the First Circuit cases, *Association for Reduction of Violence v. Hall*, 734 F.2d 63 (1st Cir. 1984) and *Bane v. Spencer*, 393 F.2d 108 (1st Cir. 1968), *cert. denied*, 400 U.S. 866 (1970), the courts below had expressly relied upon matter previously found to be protected from discovery under various privileges and therefore was held to have been inadmissible. Here, in contrast, both courts below specifically pointed out that only admissible evidence formed the basis of the rulings. Nor does Rule 56(f) of the Federal Rules of Civil Procedure offer Post solace, given that Rule 56(f) itself has no requirements with regard to privileged matters.

Finally, in one last effort to create a reviewable issue, Post claims that, in some unspecified fashion, he has been deprived of an interest in property without procedural due process. Pet. at 12. Apparently, what Post is contending is that by the District Court's granting summary judgment in defendant's favor or by the Second Circuit's affirming the correctness of that ruling, Post was deprived of a trial of the issues; therefore, his

"constitutional rights" were violated. In support of this curious proposition, Post cites no rule or decision of this Court which endows a defamation plaintiff with any unusual right to a jury trial. To the contrary, this Court has held that summary judgment is appropriate in defamation actions where the party opposing a properly supported motion does not carry his evidentiary burden. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The courts below correctly held that Post did not meet this burden. Every summary judgment granted denies a trial, but it is fatuous to contend that the possibility of error necessarily raises a constitutional question for Supreme Court review.

## POINT II

## THE SECOND CIRCUIT DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S RULING GROUNDED SOLELY IN NEW YORK LAW; THUS IN REQUESTING THAT THIS COURT REVIEW THE DECISION OF THE SECOND CIRCUIT, WHICH IS SOLIDLY BASED ON NEW YORK LAW, POST HAS SIMPLY FAILED TO PRESENT ANY REVIEWABLE ISSUE.

Post seeks review by this Court on the ground that the Second Circuit applied the wrong constitutional standard in affirming the District Court's Order granting summary judgment. Apparently, while difficult to follow, the crux of Post's claim is that he, as a private individual, "is not required by the First Amendment to establish anything more than simple fault in order to recover damages for actual injury." Pet. at 13. Post maintains that "[p]roof of actual malice or gross irresponsibility or satisfaction of any other implementation of the actual malice requirement is not required," and, therefore, the Second Circuit erred by applying an "incorrect constitutional standard." Pet. at 14. The Second Circuit, however, based its holding, as did the District Court, on well-settled New York law, not on "incorrect constitutional standard[s]." *Id.*; *see* R. at 20a-21a.

Post tellingly fails to discuss the reasoning of the courts below and their clear and explicit reliance on New York law. Rather, he retreats to obfuscatory remarks about damages and the First Amendment, mischaracterization of the holdings below and misstatement of governing legal principles. What Post carefully avoids is that, under *Gertz v. Robert Welch, Inc.*, New York is fully entitled to burden a libel plaintiff more heavily than the minimal burden imposed by the First Amendment.

The issue before the Second Circuit was whether, under New York law, the District Court had applied the appropriate standard of liability. The District Court had stated, citing New York precedent, that when the purported defamatory speech is a "matter of public concern" no standard less than that of "gross irresponsibility" may govern even in the non-media defamation context. Finding that, based on the evidence in the record, including that of reporters who testified that the Company's $165 million loss and the circumstances surrounding it were "matters of public concern," Regan's remarks were clearly of "public concern," Judge Daronco dismissed Post's libel counts based on strict liability and simple negligence. R. at 12a. The Second Circuit concurred. R. at 20a-21a.

Indeed, in articulating the only governing standard applicable to the circumstances at hand the Second Circuit recited and relied upon principles of New York law:

> *[u]nder New York law* implementing the constitutional restraints reflected in the "actual malice" standard, a plaintiff may recover only if the defendants "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."

R. at 20a (quoting *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975) (emphasis added). Moreover, in holding that the "gross irresponsibility" standard applies to non-media defendants, such as Regan and MMC, the Second Circuit again applied New York law. *Id.* (citing *Pollnow v. Poughkeepsie*

*Newspapers, Inc.*, 107 A.D.2d 10, 486 N.Y.S.2d 11 (2d Dep't 1985), *aff'd*, 67 N.Y.2d 778, 492 N.E.2d 125, 501 N.Y.S.2d 17 (1986) (dismissing libel claim against non-media defendant based upon theory of negligence holding where the challenged speech involved a matter of public concern, standard for liability for defamation in New York is "gross irresponsibility"); *Luisi v. JWT Group, Inc.*, N.Y.L.J., Sept. 18, 1987, at 7, col.3 (N.Y.Sup. Ct.), *aff'd mem.*, 138 A.D.2d 987, 525 N.Y.S.2d 454 (1st Dep't 1988) (granting summary judgment for defendant applying *Chapadeau's* "gross irresponsibility" standard to private plaintiff's libel claim against corporation and its Chairman for statements made in a company press release regarding losses to the company as a result of improper activities of the plaintiff and confirming that the plaintiff's employment had been terminated in connection with the losses)).

In other words, the issue was not what type of damages Post could recover, as he would have this Court believe, but rather whether New York law recognized causes of action for strict liability or simple negligence when the challenged speech was a "matter of public concern." Both courts below correctly held that New York law did not. There was absolutely no constitutional issue before the courts, as a reading of the opinions below clearly demonstrates. Both courts simply followed this Court's teachings in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) and applied state law. Therefore, Post's unsupported notion that he as a private individual is not required by the First Amendment to establish anything more than simple fault in which to recover damages for actual injury, (Pet. at 14), is nothing more than a red herring.

Granted, by virtue of Rule 17 of the Rules of the Supreme Court, this Court obviously enjoys great discretion in deciding whether to review a case on writ of certiorari. Equally obvious is the fact that this Court ascertains whether a "special and important" reason for review has been suggested by a petitioner. In the instant case, the Court—and Respondents for that matter—are left only to surmise the reason why Post is urging this Court to expend its precious time and resources to review a state law matter uniformly settled by the lower courts.

While such an exercise of discretion is certainly within this Court's powers, this Court should adhere to its well-settled principle that the Supreme Court traditionally refrains from reviewing questions of state law, particularly in circumstances such as those here.

This court has long stated that ordinarily it will not grant certiorari to review questions of state law. *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review"); *Atkins v. Louisiana*, 441 U.S. 927 (1979) (certiorari denied because it appeared "that the judgment below rests on independent and adequate state grounds"); *see Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967); *see also* 17 C. Wright, A. Miller & E. Cooper, *Federal Practice And Procedure*, § 4036 (1988). The Court is hesitant to review state law determinations primarily because the lower federal courts are better equipped to entertain and dispose of the issues presented. *See Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 224 n.10 (1985) (citing *Propper v. Clark*, 337 U.S. 472, 486-87 (1949)) ("hesitant to overrule decisions by federal courts skilled in the law of particular states"); *see also Butner v. United States*, 440 U.S. 48, 58 (1979); *accord Leroy v. Great Western United Corp.*, 443 U.S. 173, 181 n.11 (1979); *Bishop v. Wood*, 426 U.S. 341, 345-47 (1976).

Moreover, if the Court is again to address the extent to which the First Amendment imposes upon state defamation law a "proof of fault" requirement, it should do so in a case in which the court below considered and applied an erroneous or at least a novel standard rather than where, as here, the court followed a rule devised by the state courts which is considered to be at least as protective of First Amendment values as the Constitution requires. Simply put, the "gross irresponsibility" standard set by New York courts affords greater First Amendment protection to a libel defendant than required by federal constitutional law and thus passes constitutional muster. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court held that a private plaintiff in a defamation action cannot recover for a published falsehood unless he proves the defendant was at least

negligent in publishing the falsehood. This Court further stated that its ruling left the states free to set a higher standard. *Id.* at 347.

Under *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975) and *Pollnow v. Poughkeepsie Newspapers, Inc.*, 107 A.D.2d 10, 486 N.Y.S.2d 11 (2d Dep't 1985), *aff'd*, 67 N.Y.2d 778, 492 N.E.2d 125, 501 N.Y.S.2d 17 (1986), New York set that higher standard and therefore New York law requires that, where the speech is a matter of public concern, a private plaintiff must meet a higher burden and establish, by a preponderance of the evidence, that the publisher, whether media or non-media, acted in a grossly irresponsible manner. To the extent that Post is claiming that New York should not have set the standard that it did, given that the standard comports with the First Amendment, for this Court to grant review would be contrary to the *Erie* doctrine which mandates that even this Court defer to the law set by the state.

In sum, Post has failed to present to this Court any legal issue worthy of review. The Second Circuit, as did the District Court, based its decision squarely upon well-settled principles of New York law. Contrary to Post's spurious contentions, no "incorrect" constitutional principles were applied. Accordingly, Respondents respectfully request that this Court deny Post's Petition.

## POINT III

## BY URGING THIS COURT TO REVIEW THE FINDINGS OF THE DISTRICT COURT AND THE SECOND CIRCUIT, POST IS REQUESTING THAT THIS COURT ENGAGE IN A REVIEW OF AN ENTIRE RECORD OF FACTS—A TASK ALREADY PERFORMED THOROUGHLY BY TWO LOWER COURTS. SUCH A FRIVOLOUS REQUEST DISPLAYS A DISREGARD BOTH FOR THE COMPETENCE OF THE LOWER COURTS AND FOR GOVERNING LEGAL PRINCIPLES.

Under New York state law, the District Court was required to review the record for two purposes: First, to determine whether the alleged libels concerned "matters of public concern" as defined by New York law; and second, since the first question must be answered affirmatively, to determine if Post had presented enough evidence of "gross irresponsibility" to raise an issue of fact. Dissatisfied by the lower courts' review of the record, Post asks this Court to perform a third review. He does not suggest what criterion should impel this Court to allocate a portion of its inevitably limited time to that task in a case which, after all, involves only money damages for a single plaintiff, not a human life, an affair of state, or a fact pattern of broad application to a large population of claimants.

As to the first fact issued noted above, both courts below concurred that the undisputed facts led to no conclusion other than that the loss to MMC and the subsequent remedial actions taken by the corporation were a "matter of public concern." The District Court, citing the magnitude of the financial loss and media interest, among other evidence submitted by Respondents, found that "a loss to a public corporation of $165 million due to unauthorized trading activities and the subsequent remedial actions taken by the corporation widely reported by the media, are of public concern." R. at 11a. In contrast, the court also found that Post presented "no evidence [that] the statements were not of public concern." *Id.* Likewise, the Second Circuit was convinced that the matter at issue was one of public concern, and that "summary judgment was

appropriate on the facts of this case." R. at 21a. "The fiscal and ethical integrity of this country's large financial institutions[,]" the court held, "is a matter of grave public importance and concern." *Id.* at 20a. Post must prove therefore in accordance with New York law, that Regan acted with "gross irresponsibility" or actual malice in making his remarks. *Id.*

The courts below then properly proceeded to evaluate the undisputed evidence to determine whether there was evidence sufficient to raise a fact question as to the existence of "gross irresponsibility." Both focused upon the facts, including the investigation conducted by MMC concerning the unauthorized trading losses. The District Court concluded that the investigation was sufficiently thorough to dispel any notion of "gross irresponsibility" on the part of Respondents:

> Defendants have come forward with admissible evidence that the investigation and subsequent reporting were conducted in a careful, responsible manner. The investigation was conducted over a two-month period, and was not done hastily. It involved interviews of relevant parties and reviews of transactions and documents by inside and outside counsel, by staff and independent accountants, as well as by senior management. The prepared remarks were reviewed by those same parties.

R. at 12a.

Judge Daronco then turned to a consideration of the evidence put forth by Post:

> In opposition, plaintiff submitted Regan's testimony that the termination on June 8, 1984 was a confirmation of the decision made in early March to terminate Post. This, however, is not inconsistent as MMC did not relinquish its right to terminate plaintiff for cause prior to June 30, 1984. The fact that Post was not a party to the concealed, unauthorized trading is irrelevant as he was charged with the responsibility of enforcing MMC's investment resolutions and complying with relevant state laws. Regan merely stated that as a result of the investigation, senior

> management agreed that it was appropriate to take certain actions regarding personnel, and that Post was one of the key personnel terminated. To conclude by innuendo from this that Post was an active participant in the unauthorized activity "stretch(es) an innuendo beyond its outer limits," and is unwarranted. . . . It seems appropriate to conclude the employment period of an employee, especially one already terminated, who is charged with responsibility for the conduct of his subordinates, where the conduct was outside the scope of company policy and led to losses of $165 million.

*Id.* at 12a-13a (citation omitted).

Finally, the District Court concluded by noting that the evidence was not sufficient to raise a fact question even under the lenient "preponderance" standard (rather than the "clear and convincing" standard applicable in some libel cases):

> [B]ased on the *entire* record, neither Regan nor MMC acted in a grossly irresponsible manner, and plaintiff has not, by a preponderance of the evidence, shown that they did. As plaintiff cannot demonstrate gross irresponsibility, it follows he cannot meet the higher standard of actual malice.

*Id.* at 13a (emphasis added).

Similarly, the Second Circuit found that Respondents acted reasonably after conducting a "careful and responsible" investigation. *Id.* at 21a. The Second Circuit evaluated the evidence proferred by Post and found it sorely wanting:

> It is true, as Post claims, that his name was mentioned to reporters as one of those discharged without any distinction being made between the alleged wrongdoers and their supervisors and without disclosure of the fact that Post had plans, before the unauthorized trading was discovered, to leave MMC for apparently unrelated reasons at some unspecified future date. Even if a defamatory interpretation can be given to Regan's speech and his subsequent comments to reporters, however, these factual

> omissions cannot as a matter of law satisfy the gross irresponsibility standard.

*Id.* at 21a.

In short, the courts below weighed the undisputed evidence presented in full accord with this Court's mandates regarding summary judgment. Summary judgment was correctly granted by the District Court in Respondents' favor and the Second Circuit properly affirmed.

Respondents respectfully submit that there is simply no legitimate reason for this Court to expend its resources to review an entire record of facts peculiar to an individual diversity case to determine whether the District Court and Second Circuit correctly scrutinized that record in applying a state court defined rule of law. Indeed, such a request as Post's has traditionally been denied by this Court.

This Court has often expressed its reluctance to review the findings of lower court judges, especially when the two lower courts concur. Absent obvious and exceptional showings of error, then, this Court will defer to the lower courts. *Goodman v. Lukens Steel Co.*, ____ U.S. ____, ____, 107 S. Ct. 2617, 2623 (1987) ("[B]oth courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task."); *National Collegiate Athletic Ass'n. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 98 n.15 (1984) ("In accord with our usual practice, we must now accord great weight to a finding . . . which has been made by a district court and approved by a court of appeals."); *accord Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980); *see Berenyi v. District Director, INS*, 385 U.S. 630, 636 (1967) ("The policy underlying the "two-court" rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues.")

In the instant matter, Post comes before this Court with assertions of "egregious error" on the part of the Second Cir-

cuit. Pet. at 16. Stripped of its excess verbiage, however, Post's entire argument is simply that he disagrees with the lower courts' evaluation of the evidentiary record and their conclusion that, based on the undisputed facts, Regan and MMC had neither acted with "gross irresponsibility" nor actual malice. Curiously, despite his protestation, Post did not below, and does not here, present a focused attack on the nature and appropriateness of the investigation which defendants conducted. He does not even have an argument that defendants uttered libelous remarks so patently false as to brand the investigation a sham, since the one thing conspicuously missing from this libel suit is a clearly identified and proven false statement. In any event, however, the evaluation of the evidence presented is properly the province of the courts below, and not an issue for review by this Court.

Finally, Post repeats the same argument he previously asserted in connection with the privilege issue—that the Second Circuit has, by affirming the District Court's granting of summary judgment, deprived Post of his "fundamental" right to trial by jury. Pet. at 16. As previously discussed at Point I, *supra*, Post was not denied his right to a trial; rather, he failed to present even a scintilla of evidence that would warrant a trial. Moreover, it is well-established that the granting of summary judgment does not infringe upon the losing party's "right" to a jury trial. *E.g.*, *Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315, 320 (1902). Nor, as Post appears to suggest, is Rule 56 of the Federal Rules of Civil Procedure unconstitutional in that its successful use "deprived" him of a jury trial. *See, e.g.*, *Poller v. Columbia Broadcasting Sys. Inc.*, 368 U.S. 464 (1962); *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944); 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2714 (1983).

In sum, Post improperly seeks review by this Court of evidentiary findings by two lower courts without regard for long-standing precedent that the Court will refrain from fact finding or evidence weighing expeditions when such a mission has already been completed thoroughly by lower courts, particu-

larly when state law governs; accordingly, this Court should deny Post's frivolous Petition.

## CONCLUSION

For the reasons set forth above, Respondents John M. Regan, Jr. and Marsh and McLennan Companies, Inc. respectfully request that the instant Petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit be denied and that Respondents be awarded appropriate damages pursuant to Rule 49.2 of the Rules of the Supreme Court on the grounds that the instant Petition is clearly frivolous.

Dated: New York, New York
January 4, 1989

Respectfully submitted,

By: /s/ David L. Foster
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# APPENDIX

## LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES OF MARSH & McLENNAN COMPANIES, INC., PURSUANT TO RULE 28.1

Marsh & McLennan Companies, Inc. (Delaware)
National Economic Research Associates, Inc. (California)
National Economic Research Associates, Inc. (Delaware)
Madison Consulting Group, Inc. (Wisconsin)
Clayton Environmental Consultants, Inc. (Delaware)
Clayton Environmental Consultants of California, Inc. (California)
Clayton Environmental Consultants, Ltd. (Ontario)
Hudson Strategy Group, Inc. (Delaware)
The TBS Group, Inc. (Delaware)
LAR/Decision Research Corp. (Massachusetts)
TBS Capital, Inc. (Massachusetts)
TBS Security Corp. (Massachusetts)
TBS System Dynamics, Inc. (Massachusetts)
Temple, Barker & Sloane, Inc. (Massachusetts)
Faugere & Jutheau, S.A. (France)
Marsh & McLennan Companies GmbH (Germany)
Gradmann & Holler, K.G. (Germany)
Wolff & Hasselmann, K.G. (Germany)
Lippincott & Margulies, Inc. (New York)
C.T. Bowring & Co. Limited (United Kingdom)
Bowring Services Limited (United Kingdom)
Marsh & McLennan, Incorporated (Delaware)
Guy Carpenter & Company, Inc. (Delaware)
American Overseas Management Corporation (Canada)
Atalfa (U.K.) (United Kingdom)
Terra Nova Insurance Company Limited (United Kingdom)
The Carpenter Management Corporation (Delaware)
Guy Carpenter & Company, Inc. of Minnesota (Minnesota)
Balis & Co., Inc. (Pennsylvania)
Guy Carpenter & Company, S.A. (Belgium)
Guy Carpenter & Company (Canada) Limited (Canada)
Carpenter & Company A.p.S. (Denmark)
Carpenter & Company (Asia) Limited (Hong Kong)
Guy Carpenter Italia, S.R.L. (Italy)

Guy Carpenter & Company (Stockholm) AB (Sweden)
Bennich Reinsurance Management AB (Sweden)
Guy Carpenter & Co. Limited (United Kingdom)
Marsh & McLennan Holdings, Inc. (Delaware)
Marsh & McLennan (Korea) Ltd. (Korea)
Marsh & McLennan (Malaysia) SDN BHD (Malaysia)
Marsh & McLennan of Arkansas, Inc. (Arkansas)
M & M Insurance Management Services, Inc. (Delaware)
Marsh & McLennan World Services, Incorporated (Delaware)
Triad Services, Inc. (Delaware)
Marsh & McLennan Agency, Incorporated (District of Columbia)
Gay & Petway Insurance, Inc. (Florida)
Marsh & McLennan of Idaho, Inc. (Idaho)
Marsh & McLennan Agency, Inc. (Illinois)
Marsh & McLennan, Incorporated (Indiana)
Marsh & McLennan, Incorporated (Kentucky)
Marsh & McLennan of Louisiana, Inc. (Louisiana)
Marmac Agency, Inc. (Louisiana)
Marsh & McLennan, Inc. (Massachusetts)
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Marsh & McLennan, Inc. of Nevada (Nevada)
Marsh & McLennan of New York, Inc. (New York)
Montgomery and Montgomery Incorporated (New York)
NBA Excess and Surplus Lines, Inc. (New York)
NBA Excess and Surplus Lines (Bermuda) Limited (Bermuda)
NBA Excess and Surplus Lines, Inc. (Connecticut)
NBA Excess and Surplus Lines, Inc. (Illinois)
NBA Excess and Surplus Lines, (Missouri)
NBA Excess and Surplus Lines, Inc. (New Jersey)
NBA Reinsurance Intermediaries, Inc. (New York)
NBA Excess and Surplus Lines, Inc. (Texas)
Marsh & McLennan, Incorporated (Ohio)
Marsh & McLennan, Inc. (Oklahoma)
Marsh & McLennan of Puerto Rico, Inc. (Puerto Rico)
Marsh & McLennan, Inc. (Texas)
Marsh & McLennan of Texas, Inc. (Texas)
Marsh & McLennan, Incorporated (Virginia)
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Marsh & McLennan-Bakhsh Ltd. (Bermuda)
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Schatz Insurance Agencies, Inc. (Saskatchewan)
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Marsh & McLennan, Scandinavia A.p.S. (Denmark)
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Goodbody M.M. & S. Assurances Ltd. (Eire)
Insurance Agencies-West Indies Ltd. (Trinidad)
Insurance Brokers-West Indies Ltd. (Trinidad)
Insurance Brokers-Barbados Ltd. (Barbados)
C.T. Bowring Reinsurance Australia Pty. Ltd. (Australia)
Baillieu Bowring Holdings Pty. Ltd. (Australia)
Australian World Underwriters Pty. Ltd. (Australia)
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C.T. Bowring Reinsurance New Zealand Ltd. (New Zealand)
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Bowring Burgess Marsh & McLennan Services Ltd. (New Zealand)
Risk Management Ltd. (New Zealand)
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Reinsurance (Pacific) Ltd. (Fiji)
C.T. Bowring (South Africa) (Pty) Ltd. (South Africa)
First Bowring and Associates Holdings (South Africa) Ltd. (South Africa)
First Bowring & Associates Ltd. (South Africa)
Khulani Insurance Brokers (Pty) Ltd. (South Africa)
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Bowring Barclays & Associates (Lebowa) (Pty) Ltd. (South Africa)
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PI Insurance Brokers (Pty) Ltd. (South Africa)
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Bowring Members Agency Ltd. (England)
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C.T. Bowring Trading (Holdings) Ltd. (England)
C.T. Bowring & Co. (Fish Oils) Ltd. (England)
Baffin Trading Company Ltd. (Canada)
Tower Hill Property Company Ltd. (England)
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No. 88-949

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD O. POST, JR.,

*Petitioner*,

—against—

JOHN M. REGAN, JR. and
MARSH & MCLENNAN COMPANIES, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## POINT I

## PETITIONER NEVER CEASED TRYING TO OBTAIN THE INVESTIGATION REPORT; RESPONDENTS IDENTIFIED IT AS THE ONLY WRITING PERTAINING TO THE LIBELS IMPARTED TO THE PUBLISHER THEREOF AND RELIED UPON THE INVESTIGATION IT REPORTED IN SUPPORT OF SUMMARY JUDGMENT. THE DISTRICT COURT READ IT *IN CAMERA* AND RELIED UPON IT *EX PARTE*, AND THE SECOND CIRCUIT PERPETUATED THIS ERROR

Respondents' statement of the first question presented sets the tone for its brief by setting forth three incorrect factual statements. Thus, it is claimed that 1) petitioner "acknowledged he had full and complete opportunity to conduct discovery" of the information contained in the *in camera* investigation report; 2) that such report was "never relied upon" by respondents; and 3) that the courts below "specifically excluded" that report in considering the summary judgment motion (Brief in Opposition, p. i).

1. **Acknowledgement**. The affidavit of Charles L. Trowbridge, sworn to October 6, 1987, and submitted in support of petitioner's discovery motion is included in the appendix to this reply brief at pages 28a-33a. It describes petitioner's unabated efforts to obtain this critical report. Discovery was never "closed" in this case as stated by respondents, and petitioner's motion to obtain discovery and inspection of the report was never decided by the district court.

2. **Reliance**. In answer to petitioner's supplemental request for document production, Item 15, respondents identified the June 6, 1984, investigation report, and no other document, as "information imparted to defendant John M. Regan . . . pertaining to all or any part of the subject matter of said defendant's utterances of June 8, 1984, referred to in the amended complaint." A true copy of that demand and respondents' answer is included in the appendix to this reply brief at page

34a. At pages 49, 50 and 51 of respondents' brief to the district court in support of the summary judgment motion, respondents repeatedly claimed reliance by respondent Regan upon the results of the investigation as imparted to him by in-house and outside counsel. Those pages are appended in relevant part (35a-36a). Respondents stated, among other things:

> Certainly, when reliance on an experienced author or illustrator is sufficient to cause courts to hold that conduct is not grossly irresponsible, Mr. Regan's conduct similarly cannot be deemed culpable, given his proper reliance on his inside and outside counsel, members of the Company's senior management and so forth. Moreover, it offends logic even to suggest that the Chairman of the Board of a major corporation is not entitled to rely on *information provided to him which had been gathered by the Company's outside counsel and other experts over the course of two months* (36a). (Italics ours).

The only written report of that two month effort ever identified by respondents is the June 6, 1984, memorandum admitted in respondents' discovery response to have contained "information imparted" to Regan dealing with the libels of June 8, 1984, alleged in the amended complaint.

Respondents' claims in the brief under reply that they never relied on that report are thus contradicted by their own prior statements to the district court. Regan did not conduct the investigation. He had to rely upon the report prepared by those who did. This was the only such report. Reliance upon the investigation is tantamount to reliance upon the report. Regan never testified that he did not rely upon this report, as the brief in opposition claims. The report had not even been identified at the time he testified. His entire deposition testimony was before the courts below. Review thereof will demonstrate that he never said any such thing.

### 3. "Specifically Excluded."

What happened here is clear. The district court received and reviewed the June 6, 1984, investigation report *in camera* and

thereafter neglected to rule upon petitioner's motion for discovery thereof for use in opposing summary judgment. Respondents' statement that the district court denied the request for production of this report is misleading and untrue. The October 20, 1987, memorandum order (1a, 2a of Petition) treated that report and the broad category of documents requested as to which discovery was denied, separately. Petitioner's memorandum on the discovery motion, quoted from in the October 20, decision also treated them separately. The entire sentence from pages 1 and 2 of petitioner's memorandum partially quoted by the district court in its discovery order (1a, 2a) read:

> This motion seeks production of that June 6, 1984, memorandum together with *all documents prepared in connection with the investigation of the corporate defendants' $165 million pre-tax loss brought to light by plaintiff on April 5, 1984* and relied upon or presented to and not relied upon by defendant Regan in regard to the matters in suit. (Material quoted by the district court italicized).

Plainly, when the district court denied discovery of the documents described in the italicized language, it was not ruling as to the June 6, 1984 report.

Furthermore, it would make no sense to deny discovery of the report and then take it in for *in camera* examination.

Then the district court necessarily relied on this investigation report when it found:

> Defendants have come forward with admissible evidence that the investigation and subsequent reporting were conducted in a careful, responsible manner. The investigation was conducted over a two month period and was not done hastily. It involved interviews of relevant parties and reviews of transactions and documents by inside and outside counsel, by staff and independent accountants as well as by senior management. (12a).

There is no "admissible" or inadmissible evidence in the record which comes remotely close to providing evidentiary sup-

port for the findings of fact quoted above. There are several references in the record to the fact that an investigation was conducted, but only the investigation report to which petitioner has been denied access could provide proof of what it consisted, what it concluded, and what Regan learned about the investigation therefrom.

Respondent's assertion that the courts below "specifically excluded" the *in camera* report in considering the summary judgment motion is predicated entirely upon respondents' distorted surmise that since both courts referred to "admissible" evidence, the "inadmissible, privileged investigation" report could not have been taken into account. This ignores the unalterable fact that there is no other evidence to support the findings both courts made regarding the investigation and its conclusions. It also ignores the fact that Regan's state of mind as shaped by that which was placed before him is vitally relevant on the issue of his degree of fault, making the report uniquely important and "admissible." No independent investigation by petitioner would suffice and any claim of privilege must yield. *Herbert* v. *Lando*, 441 U.S. 153, 60 L.Ed.2d 115 (1979).

Review of the record in considering this petition will quickly confirm the truth of what we say. That, we submit, is what prompts respondents to argue so strenuously against such review.

Important individual rights have been disregarded in this case. Deceptive advocacy has been rewarded. A private citizen has had his career and reputation destroyed by flagitious falsehoods uttered to the public press and has been deprived of recourse on the basis of *ex parte* proof. Surely this merits review.

## POINT II

## THE INVESTIGATION REPORT IS NOT "ADMITTEDLY PRIVILEGED" AND SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED WITHOUT PERMITTING PETITIONER ACCESS TO IT.

Petitioner believes the investigation report advised Regan that there was no evidence petitioner had known of or participated in the improper bond trading, that petitioner had disclosed same immediately upon his discovery thereof, that petitioner cooperated in all respects with the investigation, and that petitioner had terminated his employment for independent reasons well before such discovery and disclosure.

If this is so, the case should be tried whatever standard of fault is required to be shown, and however "careful and responsible" the investigation may have been. There is abundant evidence upon which the jury can return a verdict that Regan's remarks, taken as a whole and given their normal meaning to the ordinary listener, identified petitioner as a participant who engaged in deliberate concealment of his wrongdoing, and asserted his employment to have been terminated for that reason. The jury can then return a further verdict that Regan's remarks about petitioner were knowingly false or uttered with callous disregard for the truth because he had contrary information before him in the form of the investigation report. That satisfies any fault standard from "actual malice" on down.

If the investigation report accused petitioner of the same misconduct Regan accused him of, petitioner is entitled to a trial of his libel claims against the corporate respondent on whose behalf the investigation was conducted and the report made.

Petitioner has been regarded as at fault by the Second Circuit and the district court on the basis of an investigation, the principal evidence of which he has not seen (21a and 12a). Review of the record will reveal the overwhelming evidence probative of petitioner's non-culpability in the entire affair, including the results of the massive investigation by the SEC finding no

wrongdoing on his part and the corporate respondent's detailed memorandum in support of its loss claim against its fidelity underwriters which contained no suggestion of any fault on the part of petitioner. The SEC conclusions are clearly admissible under this Court's recent decision in *Beech Aircraft Corp.* v. *Rainey*, 57 U.S. Law Week 4043 Nos. 87-981 and 87-1028 (Dec. 12, 1988).

Petitioner will demolish any suggestion of fault on his part that may be found in the investigation report at trial. But he has to see it in order to do so. The courts below have denied him that opportunity by dismissal without trial by jury of genuine issues of fact.

## POINT III

## REVIEW SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S ERRONEOUS VIEW OF NEW YORK'S GROSS IRRESPONSIBILITY STANDARD AS A CONSTITUTIONAL REQUIREMENT EFFECTIVELY DEPRIVED PETITIONER OF APPELLATE REVIEW OF THE DISMISSAL OF HIS ACTUAL DAMAGE CLAIMS

Respondents claim the degree of fault required to be proved is solely a state law issue. The Second Circuit regarded it as a constitutional issue. Review should be granted either way.

So far as state law is concerned, in its decision establishing the gross irresponsibility standard, *Chapadeau* v. *Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196 (1975), the New York State Court of Appeals in a libel suit against a newspaper, after discussing the decisions of this Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686 (1964) through *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 789 (1974), stated:

> We now hold that within the limits imposed by the Supreme Court where the content of *the article* is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposi-

> tion, the party defamed may recover; however, to warrant such recovery he must establish, by a preponderance of the evidence, that *the publisher* acted in a grossly irresponsible manner without due consideration for the *standards of information gathering and dissemination* ordinarily followed by responsible parties (p. 199) (italics ours).

The reference to "the article", "the publisher" and "standards of information gathering and dissemination" is strongly suggestive of the view that introduction of the grossly irresponsible standard was designed to protect the media—journalists striving to report fast breaking news events with limitations upon time and access to information. The New York Court of Appeals has never held the grossly irresponsible requirement applicable to a non-media defendant.

It is thus an open question in the New York State Court of Appeals today whether a person like Regan having intimate familiarity with the subject matter of the speech in question, an elite staff of investigators and professional assistants and plenty of time to check the facts, would enjoy the same protection as a journalist.

By mistakenly regarding petitioner's actual damage claims as subject to an enhanced constitutional fault requirement, the Second Circuit disabled itself from determining whether the New York Court of Appeals would extend *Chapadeau* to non-media defendants as a matter of state law, notwithstanding the lesser constitutional requirement of simple fault.

The lower state court decisions relied upon by respondents on the gross irresponsibility question, *Luisi* v. *JWT Group, Inc.*, N.Y.L.J., September 18, 1987, at 7, Col. 3 (N.Y.Sup.Ct.), affirmed mem., 138 A.D.2d 987, 525 N.Y.S.2d 454 (1st Dept. 1988), and *Pollnow* v. *Poughkeepsie Newspapers, Inc.*, 107 A.D.2d 10, 486 N.Y.S.2d 11 (2d Dept. 1985), affirmed, 67 N.Y.2d 778 (1986), are unreliable state law authority because both approach the question as though it is a constitutional and not a state law issue. The New York Court of Appeals was at

pains to note in *Pollnow* that the gross irresponsibility issue was conceded and therefore not decided by it.

The Second Circuit's incorrect view of the constitutional proof of fault requirement abundantly justifies this Court's review.

## CONCLUSION

FOR THE REASONS STATED ABOVE AND IN THE PETITION, A WRIT OF CERTIORARI SHOULD BE GRANTED TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respectfully submitted,

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*RICHARD O. POST, JR.,*

CONSTANTINE W. PAPAS
*Of Counsel*

# APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

84 Civ. 9185 (RJD)

RICHARD O. POST, JR.,

*Plaintiff*,

—against—

JOHN M. REGAN, JR., and
MARSH & MCLENNAN COMPANIES, INC.,

*Defendants.*

AFFIDAVIT IN SUPPORT OF MOTION FOR PRODUCTION OF DOCUMENTS

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

CHARLES L. TROWBRIDGE, being duly sworn, deposes and says:

1. He is a member of the firm of Walker & Corsa, attorneys for plaintiff in this libel and breach of contract action, is fully familiar with the papers and proceedings heretofore had herein, and makes this affidavit in support of plaintiff's motion pursuant to Rules 26 *et seq.*, 34 and 37 FRCP directing defendants to produce for inspection and copying at least 10 days before the trial, all writings, whether prepared by counsel or otherwise, placed before, or the contents of which were in any way communicated to, defendant John M. Regan, Jr., on or before June 8, 1984, which refer or relate to the matter of the bond trading losses and related activities forming the subject of the pleadings in this case and/or plaintiff's connection therewith, including but not limited to, those writings which it is contended by

defendants on their summary judgment motion that Mr. Regan relied upon in making the statements pertaining thereto, or, if considered appropriate by this Honorable Court, directing such production and the deposition of defendant John M. Regan, Jr., for use in connection with the pending summary judgment motion.

2. On June 25, 1986, we served and filed supplemental requests for documents and interrogatories. Defendant served and filed a response, (copy annexed hereto as Exhibit 1)—which quotes our requests—and proceeds to embark upon definitions, general objections, specific objections, alleged inability to understand very simple demands and produces virtually no usable discovery in this case. Defendant refused to answer any of the interrogatories. We are reluctant to ask this Court to review this but a glance at it will reveal what we are up against and have been up against in this case.

3. Our supplemental document request No. 15 asked for all the documents pertaining to "information imparted to defendant John M. Regan, Jr., from any source whatsoever, pertaining to all or any part of the subject matter of said defendant's utterances of June 8, 1984 referred to in the amended complaint or the answer and counterclaim herein" (Ex. 1, p. 18). Defendants responded as follows:

> "Defendants object to this request insofar as it requests 'any and all' documents relating to 'information' from 'any source whatsoever' on the grounds that it is vague, overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence and requests documents prepared subsequent to June 8, 1984. Defendants further object to this Request insofar as it seeks information subject to the attorney-client and work product privileges. *See* General Objection No. 1. Insofar as the defendants are able to discern the import of request No. (a) 15, subject to the general objection stated above and subject to the specific limitations indicated herein with respect to other Requests, defendants herewith identify, without waiving same, one privileged document as a draft

Memorandum, dated June 6, 1984, from counsel to files, prepared for the purposes of rendering legal advice and in anticipation of litigation." (Ex. 1, p. 18).

4. Since the state of defendant Regan's mind when he made the remarks which form the subject of this lawsuit is highly relevant, and since the best and most reliable way to prove that state of mind is to develop that which was communicated to him, we pressed defendants' counsel in subsequent conversations and correspondence to produce the reports they made to Mr. Regan and anything else that he had before him in the way of information as input for what he said on June, 8, 1984. It was, and is, difficult for deponent to accept that with all the high powered investigation and analyses taking place, only one "privileged" document could be located by defendants' counsel that had any bearing. This doubt has been exacerbated by Exhibit 2, hereto, a May 2, 1984, memorandum from in-house counsel at MMC directing memoranda generated in the bond loss matter at MMC to be sent to a partner in MMC's outside law firm with all drafts to be destroyed.

5. We have had no success with these requests. We thereafter noticed the deposition of the corporate defendant by Mr. Regan (previously we had taken his deposition pursuant to a notice directed to him as individual defendant very early in the case without requesting any documents other than those needed by Mr. Regan to refresh his recollection). Defendants' counsel refused to produce him and this led to a further motion before Judge Griesa that came on to be heard on June 12, 1986. A transcript of those proceedings was taken and is annexed hereto as Exhibit 3. Judge Griesa declined to direct Mr. Regan to appear for further deposition. He stated at page 23 of Exhibit 3

"THE COURT: Why couldn't you have asked him? The reason I ask is this, that discovery is a pretty big burden and Mr. Regan has got big responsibilities, and I don't like to worry any more about the head of a company than other people, but heads of companies are, the fact of life is they are pretty busy, and I don't

really seek to have him coming back and back to depositions.

Furthermore, you will have a trial, and you can ask him. It is not unknown for people to realize between depositions and trial that there are a few other questions they want to ask, so I don't really see why you have to button it down quite so finely in deposition. Why do you have to do that?

MR. TROWBRIDGE: Okay.

THE COURT: I would just ask him at the trial. Undoubtedly, if it goes to trial, there will be plenty of ideas everybody has.

So why don't you do it without further depositions.

MR. TROWBRIDGE: Okay.
(p. 23).

Plainly, the assumption underlying the denial of this deposition was that we would have an opportunity to examine Regan at trial.

6. Now, by summary judgment motion before a new judge, defendants would deprive plaintiff of any opportunity to question Regan about sources he relied upon in making his remarks of June 8, 1984 or to examine the documents, including those prepared by counsel, which were before him at that time. To compound the unfairness here, defendants, in seeking to deprive plaintiff of his day in court, inject as an issue in this case Mr. Regan's alleged right to rely upon the "expert advisors" he consulted, without disclosing to Court or counsel what the content of that being relied upon was. Thus, at page 50 of defendants' memorandum in support of the summary judgment motion it is stated:

> "As Mr. Regan testified, the remarks that he made at the Company's June 8, 1984 Annual Meeting had been prepared by Mr. Regan in conjunction with the Company's outside counsel Willkie Farr & Gallagher, the law firm that

> had conducted the factual internal investigation of the Company's $165 million loss . . . Further, the Company's in-house general counsel participated in reviewing the remarks as to senior management of the Company . . . Mr. Regan's conduct similarly cannot be deemed culpable, given his proper reliance on his inside and outside counsel. . ."

And again at page 51:

> "Moreover, it offends logic even to suggest that the Chairman of the Board of a major corporation is not entitled to rely on information provided to him which had been gathered by the Company's outside counsel and other experts over the course of two months . . . In these circumstances, Mr. Regan and the Company's senior management simply would have no reason to question the information provided to them by their advisors."

In item 23 of their Rule 3(g) statement Regan's statements it is alleged "were made in good faith and were believed by him to be true on the basis of reasonable inquiry, investigation and advice of his advisors".

7. As the accompanying memorandum of law demonstrates, and common sense dictates, where state of mind is an issue and particularly where a party to litigation has introduced in issue his good faith or his faithful reliance upon information provided by counsel, there is no privilege or, if there is one it has been waived, and the documents or information must be produced.

8. Regan testified on the brief deposition he gave that he had no knowledge of any participation or knowledge on the part of Mr. Post of the fraudulent practices, concealment, or actual trading which produced the bond losses. This would suggest that he had no reports of counsel, senior management or from other sources that would so indicate. Yet he made the remarks sued upon which accuse Post of complicity in all this as spelled out in Mr. Post's affidavit at paragraphs 14 through 56. What did the June 6, 1984 memorandum from his attorneys to their

file that was admittedly provided to Mr. Regan, and upon which he claims to have relied in good faith tell him? What else did he review that framed his state of mind? Where is the product of this two months long investigation as imparted to Regan? Court and counsel and jury have an absolute right to know in this case. Defendants have put it in issue. Surely they cannot fairly request summary judgment predicated upon the alleged faithful reliance by Mr. Regan on what he has been told and then decline to produce the best and only evidence of what he has been told by reason of "privilege" or "work product" or whatever other objections they have.

9. If Regan had "advice" that plaintiff knew of, participated in, concealed or was fired because of, the bond trading, that should be disclosed whatever its form. If he had "advice" to the contrary, that should be disclosed.

10. For the reasons separately submitted, summary judgment should be denied and it is no defense to the claims against defendants herein that Mr. Regan may have been parroting what others told him. However, since we still will have to contend with the claim that Mr. Regan relied upon these materials at the trial, and they are evidence of his state of mind as of June 8, 1984, production should be directed pursuant to Rules 34 and 37 of the Federal Rules of Civil Procedure at least 10 days before trial. If there is any serious consideration to be given to the granting of summary judgment, plaintiff should have the opportunity to examine Mr. Regan on deposition subsequent to the production of the alleged sources relied upon, and those called to his attention, whether or not he relied upon them for consideration on the motion.

Sworn to before me this
6th day of October, 1987

/s/ CHARLES L. TROWBRIDGE
Charles L. Trowbridge

CATHERINE A. DAUPHIN
Notary Public
CATHERINE A. DAUPHIN
Notary Public State of New York
No. 010A-4563742
Qualified in Richmond County
Commission Expires Oct. 15, 1988

**Item 15 of Defendants' Response to Plaintiff's Supplemental Document Request**

15. Information imparted to defendant John M. Regan, Jr., from any source whatsoever, pertaining to all or any part of the subject matter of said defendant's utterances of June 8, 1984 referred to in the amended complaint or the answer and counterclaim herein.

*Response to Request No. (a) 15*:

Defendants object to this Request insofar as it requests "any and all" documents relating to "information" from "any source whatsoever" on the grounds that it is vague, overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence and requests documents prepared subsequent to June 8, 1984. Defendants further object to this Request insofar as it seeks information subject to the attorney-client and work product privileges. *See* General Objection No. 1. Insofar as defendants are able to discern the import of Request No. (a) 15, subject to the general objections stated above and subject to the specific limitations indicated herein with respect to other Requests, defendants herewith identify, without waiving same, one privileged document as a draft Memorandum, dated June 6, 1984, from counsel to files, prepared for the purposes of rendering legal advice and in anticipation of litigation.

**Excerpts from Defendants' Brief in Support of Motion for Summary Judgment (pages 49, 50 and 51).**

As applied, under the *Chapadeau* standard, a "publisher," either private or media, cannot be "grossly irresponsible" if he "publishes" information obtained from a dependable source unless the "publisher" had substantial reasons to doubt the accuracy of the information: *See, e.g., Nelson v. Globe International, Inc., supra*, 626 F. Supp. at 976; *Rust Communications, Inc. v. 70 State Street Travel Service, Ltd.*, 122 A.D.2d 584, 504 N.Y.S.2d 927, 927-28 (4th Dept. 1986).

As a general matter, a demonstration of reliance on a professional experienced in the field and/or the review of the material to be "published" by trusted advisors negates any inference of "gross irresponsibility" and warrants granting summary judgment in defendants' favor. *E.g., Nelson v. Globe International, Inc., supra* (defendant relied on an experienced journalist, and editors and advisors reviewed; therefore, conduct was not grossly irresponsible and summary judgment granted); *Chapadeau v. Utica Observer-Dispatch, supra* (two authorities consulted and article reviewed by two advisors proves that defendant's conduct was not "grossly irresponsible;" therefore, summary judgment appropriate); *Rust Communications Group, Inc. v. 70 State Street Travel Service, Ltd., supra* (entitled to rely on U.P.I. wire service and local newspaper item; therefore, no "gross irresponsibility," and summary judgment mandated); *Quezada v. The Daily News, supra* (not "gross irresponsibility" to rely solely on experienced professional illustrator to produce "fictionalized" drawing; therefore, summary judgment granted).

Applying this standard to the instant action, it is abundantly clear that the undisputed facts demonstrate, as a matter of law, that Mr. Regan's conduct was not "grossly irresponsible." As Mr. Regan testified, the remarks that he made at the Company's June 8, 1984 Annual Meeting had been prepared by Mr. Regan in conjunction with the Company's outside counsel, Willkie Farr & Gallagher, the law firm that had conducted the factual internal investigation of the Company's $165 million loss. (Regan dep. at 6; Exhibit 17 to the Foster Aff.). Further,

the Company's in-house general counsel participated in reviewing the remarks as did senior management of the Company. (Regan dep. at 6). Mr. Regan summarized the amount of expert advisors that he relied upon in connection with the preparation and review of the remarks quite succinctly: "I asked for a lot of help. . . . I got a lot of counsel both inside and outside on it." (Regan dep. at 6-7).

Certainly, when reliance on an experienced author or illustrator is sufficient to cause courts to hold that conduct is not grossly irresponsible, Mr. Regan's conduct similarly cannot be deemed culpable, given his proper reliance on his inside and outside counsel, members of the Company's senior management and so forth. Moreover, it offends logic even to suggest that the Chairman of the Board of a major corporation is not entitled to rely on information provided to him which had been gathered by the Company's outside counsel and other experts over the course of two months. (*See* Exhibits 14, 15, 16 and 17 to the Foster Aff.). In these circumstances, Mr. Regan and the Company's senior management simply would have no reason to question the information provided to them by their advisors.